DOCKET

No. 12-1226

Title:	Peggy Young, Petitioner
	v.
	United Parcel Service, Inc.
Docketed:	April 10, 2013
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(11-2078)
Decision Date:	January 9, 2013

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Apr 8 2013	Petition for a writ of certiorari filed. (Response due May 10, 2013)
May 2 2013	Order extending time to file response to petition to and including June 10, 2013.
May 10 2013	Brief amici curiae of Law Professors, and Women's Rights Organizations filed.
Jun 7 2013	Brief of respondent United Parcel Service, Inc. in opposition filed.
Jun 12 2013	Reply of petitioner Peggy Young filed.
Jun 19 2013	DISTRIBUTED for Conference of September 30, 2013.
Oct 7 2013	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 19 2014	Brief amicus curiae of United States filed.
Jun 2 2014	Supplemental brief of petitioner Peggy Young filed.
Jun 3 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 4 2014	Supplemental brief of respondent United Parcel Service, Inc. filed. (Distributed)
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	DISTRIBUTED for Conference of June 30, 2014.
Jul 1 2014	Petition GRANTED.
Jul 18 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 4, 2014.
Jul 18 2014	The time to file respondent's brief on the merits is extended to and including October 24, 2014.
Jul 29 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 31 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, December 3, 2014.
Sep 4 2014	Brief of petitioner Peggy Young filed.
Sep 4 2014	Joint appendix filed (two Volumes). (Statement of costs filed.)

Sep 10 2014	Brief amici curiae of Law Professors and Women's and Civil Rights Organizations filed.
Sep 10 2014	Brief amici curiae of American Civil Liberties Union and A Better Balance, et al. filed.
Sep 11 2014	Brief amici curiae of Black Women's Health Imperative, et al. filed.
Sep 11 2014	Brief amicus curiae of the United States filed.
Sep 11 2014	Brief amici curiae of U.S. Women's Chamber of Commerce, et al. filed.
Sep 11 2014	Brief amici curiae of Members of Congress filed.
Sep 11 2014	Brief amici curiae of 23 Pro-Life Organizations and the Judicial Education Project filed.
Sep 11 2014	Brief amici curiae of National Education Association, et al. filed.
Sep 11 2014	Brief amici curiae of Bipartisan State and Local Legislators filed.
Sep 11 2014	Brief amici curiae of Health Care Providers, et al. filed.
Sep 11 2014	Brief amicus curiae of Leadership Conference on Civil and Human Rights filed.
Sep 22 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 22 2014	Record requested from U.S.C.A. 4th Circuit.
Sep 25 2014	Record received from U.S.D.C. of Maryland. The record is electronic and located on PACER.
Oct 3 2014	Record received from U.S.C.A. 4th Circuit is electronic and located on PACER. Also received from U.S.C.A. 4th Circuit is 1 Box, the records are SEALED.
Oct 24 2014	Brief of respondent United Parcel Service, Inc. filed.
Oct 31 2014	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
Oct 31 2014	Brief amicus curiae of American Trucking Associations, Inc. filed.
Oct 31 2014	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed.
Oct 31 2014	Brief amicus curiae of U.S. Chamber of Commerce filed.
Nov 3 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 7 2014	CIRCULATED.
Nov 20 2014	Reply of petitioner Peggy Young filed. (Distributed)
Dec 3 2014	Argued. For petitioner: Samuel R. Bagenstos, Ann Arbor, Mich.; and Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Caitlin J. Halligan, New York, N. Y.
Mar 25 2015	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Sotomayor, and Kagan, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Scalia, J., filed a dissenting opinion, in which Kennedy and Thomas, JJ., joined. Kennedy, J., filed a dissenting opinion.
Mar 25 2015	Record from U.S.C.A. 4th Circuit has been returned.
Apr 27 2015	JUDGMENT ISSUED

PETITION FOR WRIT OF CERTIORARI

12-1226

No. 12-____

In The

Supreme Court Of The United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

QUESTION PRESENTED

The Pregnancy Discrimination Act ("PDA") provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The question presented is:

Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

PARTIES TO THE PROCEEDING

Peggy Young was plaintiff-appellant in the proceedings below.

United Parcel Service, Inc. ("UPS") was defendant-appellee in the proceedings below.

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The opinion of the court of appeals is reported at 707 F.3d 437, and reprinted in the Appendix ("App.") at 1a. The opinion of the district court granting summary judgment is reported at 2011 WL 665321. It is reprinted at App. 30a.

JURISDICTION

The court of appeals entered judgment on January 9, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), is reprinted at App. 84a.

STATEMENT OF THE CASE

A. This case involves Petitioner Peggy Young's claim that Respondent UPS violated the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). Congress enacted the PDA to overturn this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). *See Newport News Shipbuilding & Dry Dock Co.* v. *E.E.O.C.*, 462 U.S. 669, 670 (1983). *Gilbert* held that pregnancy discrimination is not sex discrimination for purposes of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and that an employer's disability insurance plan was "facially

nondiscriminatory" when it provided benefits for nonoccupational sickness or accidents but not for pregnancy. *Gilbert*, 429 U.S. at 138. The PDA responded to *Gilbert* by adding a subsection to Title VII that provides that (1) "[t]he terms 'because of sex' or 'on the basis of sex'" include "because of pregnancy, childbirth or related medical conditions" and (2) "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

B. Respondent UPS hired Petitioner Young in 1999; in January 2002, she began working as a part-time, early-morning "air driver." App., *infra*, at 4a, 31a. [1] In that job, Young was responsible for "meet[ing] a shuttle from the airport bearing letters and packages for immediate delivery" and delivering them by 8:30 that morning. *Id.* at 4a–5a, 32a–33a. "Young typically finished her work responsibilities by 9:45 or 10 in the morning, and then proceeded to her second job at a flower delivery company." *Id.* at 5a, 33a. Because "[a]ir delivery is more expensive by weight than ground delivery," air drivers "often carr[y] lighter letters and packs, as opposed to heavier packages." *Id.* at 31a. Although UPS's list of essential job functions purports to require air drivers to be able to "lift, lower, push, pull, leverage and manipulate" letters and packages "weighing up to 70 pounds" and to "[a]ssist in moving packages weighing

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[1] Because this case arises out of the district court's grant of summary judgment to UPS, all facts in the record must be viewed, and all reasonable inferences drawn, in favor of Young as the nonmoving party. *See Crawford* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 (2009).

up to 150 pounds," *id.* at 5a, 31a–32a, these lifting requirements were not a significant part of Young's day-to-day job: "[P]ackages heavier than 20 pounds were infrequent, she was able to use a hand truck, and other employees could and sometimes did take heavy packages for her." *Id.* at 32a (citations omitted).

In July 2006, Young sought, and UPS granted, a leave of absence so that she could undergo a round of *in vitro* fertilization. App., *infra*, at 5a. The round was successful, and Young became pregnant. *Id.* at 5a, 39a. In October 2006, Young gave her supervisor and UPS's occupational health manager a note from her midwife recommending that she not lift over twenty pounds during her pregnancy. *Id.* at 5a–6a, 40a. Young explained that she wanted to return to work, and "that she was willing to do either light duty or her regular job." App., *infra*, at 5a. The manager explained that "UPS offered light duty for those with on-the-job injuries, those accommodated under the ADA, and those who had lost [Department of Transportation] certification, but not for pregnancy," and that "UPS policy did not permit Young to continue working as an air driver with her twenty-pound lifting restriction." *Id.* at 6a–7a. In November, Young spoke to UPS's division manager, who "told her she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" *Id.* at 8a. As a result, Young was required to go on an extended, unpaid leave of absence, during which she lost her medical coverage. *Id.* She did not return to work until June 2006, just short of two months after she gave birth. *Id.* at 43a–44a.

C. By its own admission, UPS offers work accommodations to three categories of employees. First, the collective bargaining agreement that covered Young "provides temporary alternative work ('TAW') [also referred to as "light-duty" work] to employees 'unable to perform their normal work assignments due to an *on-the-job-injury*.'" App., *infra*, at 3a–4a (emphasis in Court of Appeals' opinion) (quoting the Collective Bargaining Agreement ("CBA")). But UPS also accommodates employees who acquire injuries and medical conditions off the job. Thus, the second category of employees that UPS accommodates consists of workers with "a permanent impairment cognizable under the [Americans with Disabilities Act]." *Id.* at 4a. And the third category consists of drivers who are ineligible for Department of Transportation ("DOT") certification to drive a commercial motor vehicle. *Id.* at 4a, 34a. An employee might lose DOT eligibility for any number of reasons, including vision impairments, high blood pressure, diabetes, sleep apnea, and impairments of the arm or legs. *See* 49 C.F.R. §§ 391.41(b), 391.43; R. 76, attach. 20 at 21–24. Disqualifying conditions like these can arise from diseases contracted outside of work, or even from out-of-work sports injuries. *See* R. 76, attach. 20 at 64. UPS offers drivers who are ineligible for DOT certification what it calls an "inside job." App., *infra*, at 4a. Such jobs "often involve[] heavy lifting," *id.*, but they do not always; when drivers have acquired injuries that have rendered them unable to lift, UPS has assigned them to inside jobs that do not require heavy lifting. R. 76, attach. 21 at 5–11 (driver who had a stroke and kidney disease assigned to clerk's job answering phone calls); R. 76, attach. 18 at 44–50,

61 (driver with ankle injury acquired outside of the workplace assigned to scan but not lift packages). But UPS refuses to offer such accommodations to workers who cannot lift because they are pregnant. App., *infra*, at 6a–7a, 35a.

D. After exhausting her remedies with the Equal Employment Opportunity Commission ("EEOC"), Young filed this lawsuit in October 2008 in the United States District Court for the District of Maryland. App., *infra*, at 8a, 44a. The complaint alleged, *inter alia*, that UPS violated the PDA by failing to provide Young the same accommodations as it provided to nonpregnant employees who were similar in their ability to work. *Id.* at 8a–9a. In February 2011, the district court granted summary judgment to UPS. *Id.* at 9a. The court concluded that UPS's determination not to accommodate Young's lifting restriction turned on "gender-neutral criteria," because UPS accommodates "only drivers (1) who suffered on-the-job injuries; (2) who were disabled under the Americans with Disabilities Act; or (3) [who] lost their DOT certification to drive." *Id.* at 56a. Because this policy was "gender-neutral," the district court concluded that it did not constitute direct evidence of discrimination. *Id.* Nor could it support an inference "that the employer has animus directed *specifically* at pregnant women," which the court thought necessary to support a prima facie case under the analysis of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). *See id.* at 61a.

The Fourth Circuit affirmed. *See* App., *infra*, at 3a. The court concluded that "UPS ha[d] crafted a pregnancy-blind policy" by "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT

certification." *Id.* at 18a. Although Young had argued that UPS's limitation of accommodations to individuals in those three categories violated the PDA's requirement that pregnant women "shall be treated the same" as nonpregnant employees "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the Fourth Circuit held that the statute's "shall be treated the same" language "does not create a distinct and separate cause of action." *Id.* at 20a–21a. A contrary holding, the court concluded, would "imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted." *Id.* at 23a. The Fourth Circuit thus felt "compelled to disagree with" the Sixth Circuit's earlier decision in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996), which had adopted the argument that Young pressed below. *See id.* at 23a.

Finally, the Fourth Circuit concluded that "a pregnant worker subject to a temporary lifting restriction is not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." App., *infra*, at 27a. Unlike an individual with an ADA-qualifying disability, Young's limitation "was temporary and not a significant restriction on her ability to perform major life activities." *Id.* Unlike "employees guaranteed an inside job or light duty under the CBA provision for drivers who have lost DOT certification," there was "no legal obstacle" preventing Young from working—and unlike at least some of those drivers, who "maintained the ability to perform any number of demanding physical tasks," Young "labored under an apparent inability to perform tasks involving

lifting." *Id.* at 27a–28a (footnote omitted) (internal quotation marks omitted). Finally, the court concluded that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a.

Based on these rulings, the Fourth Circuit agreed that Young had presented neither direct evidence of pregnancy discrimination, nor even a prima facie case of such discrimination. *See id.* at 24a, 29a.

REASONS FOR GRANTING THE PETITION

The question presented is exceptionally important. As the General Counsel of the EEOC recently observed, "[d]iscrimination against pregnant women and caregivers potentially affects every family in the United States." *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission* (Feb. 15, 2012) (statement of P. David Lopez, General Counsel).[2] And the EEOC has recognized that the problem is not merely a potential one but an actual one; it filed more than 260 pregnancy discrimination suits in the ten fiscal years preceding 2012. *See id.* Denial of workplace accommodations to pregnant workers in circumstances in which other employees receive them is a particularly common fact pattern. *See id.* (statement of Sharon Terman) ("[L]ow-wage

[2] *Available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/transcript.cfm.

pregnant women are routinely denied modest workplace accommodations that would enable them to keep working while maintaining healthy pregnancies."); *id.* (statement of Emily Martin) (failure to provide "slight job modifications" is "today one significant reason why pregnant women lose their jobs"); *id.* (statement of Joan Williams) ("[L]ifting restrictions today are playing the same role in pushing women out of the workplace that high school education requirements played in pushing African-Americans out of the workplace some decades ago.").

The Fourth Circuit's resolution of that exceptionally important question demands this Court's review. By holding that UPS is not required to provide workplace accommodations to a pregnant woman, even though the company provides those accommodations for three categories of workers "similar in their ability or inability to work," the court disregarded the plain statutory text, 42 U.S.C. § 2000e(k). The Fourth Circuit also disregarded this Court's and the EEOC's prior interpretations of that text, as well as the legislative history of the Pregnancy Discrimination Act. Indeed, the court's holding that "pregnancy-blind" rules can insulate an employer from PDA liability would render ineffective Congress's acknowledged effort to overturn *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), for the disability insurance plan at issue in *Gilbert* was "pregnancy-blind" in the same way UPS's accommodations policies are "pregnancy-blind" here. And although the Fourth Circuit noted that the three categories of workers UPS accommodates are different from pregnant workers in *other* respects, they are similar in the only respect the statutory text

makes relevant: "the[] ability or inability to work." 42 U.S.C. § 2000e(k).

The Fourth Circuit's utter disregard of the plain text of the statute, especially in resolving such an important issue, would alone be sufficient to warrant this Court's review. In addition, as numerous commentators have observed, the question presented is the subject of longstanding division within the circuits. The Fourth Circuit noted this division and expressly "disagree[d]" with a Sixth Circuit decision taking the opposite position. App., *infra*, at 23a. The Fourth Circuit's decision is also inconsistent with a decision of the Tenth Circuit, though it finds support in cases from the Fifth, Seventh, and Eleventh Circuits. This Court's intervention is necessary to resolve that disagreement.

A. The Fourth Circuit's Decision Directly Conflicts with the Text of the PDA

The summary judgment record demonstrates, and the Fourth Circuit did not deny, that UPS provided accommodations to three classes of employees: employees with work limitations acquired through on-the-job injuries; employees who have a "disability" as defined by the ADA; and employees with injuries or conditions that render them ineligible for Department of Transportation certification to drive a commercial vehicle. If an employee in one of those classes were, because of his or her condition, unable to lift more than twenty pounds, the summary judgment record indicates that UPS would accommodate that limitation. Peggy Young experienced the same lifting restriction. But although she was "similar in [her] ability or inability

to work" as employees in those classes, UPS did not treat her "the same for all employment-related purposes" as those employees. 42 U.S.C. § 2000e(k). Instead, the company denied Young's request for an accommodation. UPS therefore violated the plain, express terms of the PDA.

In denying that conclusion, the Fourth Circuit disregarded the clear statutory text—and this Court's own prior interpretations of that text.[3] The Fourth Circuit recognized that the plain language of the PDA's second clause—which provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k)—was "unambiguous." App., *infra*, at 20a. But the court refused to read the statute's "shall be treated the same" language in accord with that unambiguous meaning. Instead, the Fourth Circuit believed it necessary "to reconcile" that plain meaning with "language in the [statute's]

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[3] The Fourth Circuit also disregarded the Equal Employment Opportunity Commission's interpretation of the PDA. *See* 29 C.F.R. Pt. 1604 App. ¶ 5 ("If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."); *E.E.O.C.* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1995–96 (10th Cir. 2000) (EEOC argued that an employer violated the PDA by providing work accommodations to employees injured on the job, an employee suffering endometriosis, and an employee with a knee injury from a car accident, while denying the same accommodations to pregnant workers). As the view of the agency that enforces Title VII and the PDA, this interpretation is "entitled to a measure of respect" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *See Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).

first clause," which the court read as "suggesting the PDA simply expands the category of sex discrimination (without otherwise altering Title VII)." *Id.*

But nothing in the PDA's first clause requires a court to work to reconcile it with the second—much less to "reconcile" the two clauses in a way that departs from the second clause's plain and unambiguous meaning. The PDA's first clause provides, simply, that in Title VII "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). There is nothing in that text that detracts from the plain meaning of the second clause—that if an employer accommodates nonpregnant employees who are "similar in their ability or inability to work" as pregnant employees, it must "treat[]" those pregnant employees "the same" by providing them the same accommodations. Indeed, this Court has recognized that "'[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work.'" *Int'l Union* v. *Johnson Controls*, 499 U.S. 187, 204–05 (1991) (quoting *California Fed. Sav. & Loan Ass'n.* v. *Guerra*, 479 U.S. 272, 297 (1987) (White, J., dissenting)).

The Fourth Circuit held that Young was not similar to an employee with a twenty-pound lifting restriction caused by an ADA-qualifying disability, an on-the-job injury, or an injury or condition that disqualifies a driver from DOT certification. The court believed that such employees would not be

relevant comparators for PDA purposes, because they would receive accommodations pursuant to a "neutral, pregnancy-blind policy." App., *infra*, at 18a, 27a. By that, the court apparently meant that UPS would not deny accommodations to pregnant workers if they *also* had ADA-qualifying disabilities, on-the-job injuries, or DOT-disqualifying conditions. But that ruling disregards the plain text of the PDA. The statute does not ask *why* an employer refused to give a pregnant worker an accommodation that it extended to a nonpregnant employee; it simply asks whether the pregnant employee has been "treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

Far from applying the statutory text, the Fourth Circuit's "neutral, pregnancy-blind policy" rule is more consistent with this Court's analysis in *General Electric Co.* v. *Gilbert*, *supra*—the case Congress expressly sought to *overturn* by adopting the PDA. *See Newport News Shipbuilding*, 462 U.S. at 676 (concluding that "Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric* v. *Gilbert*, but also rejected the test of discrimination employed by the Court in that case") (citation omitted). The Court's opinion in *Gilbert*, after all, held that an employer's failure to cover pregnancy in its disability insurance plan was "facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" *Gilbert*, 429 U.S. at 138 (quoting *Geduldig* v. *Aiello*, 417 U.S. 484, 496–97 (1974)). This, of course, is exactly the same sense in which UPS's denial of

accommodations to Young was "neutral" and "pregnancy-blind"—there is no injury or condition for which nonpregnant workers are accommodated and pregnant workers are not. Indeed, the disability insurance plan at issue in *Gilbert* was "pregnancy-blind" under the same analysis. That plan provided both pregnant and nonpregnant workers coverage for "nonoccupational sickness or accident." *Id.* at 128. It simply failed to provide coverage for what the Court called the "*additional* risk" of pregnancy itself. *Id.* at 139. But, the Court concluded, "the failure to compensate [pregnant women] for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.*

As this Court has recognized, when Congress enacted the PDA "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding*, 462 U.S. at 678. And this Court has explained that the PDA's second clause in particular "was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *California Fed.*, 479 U.S. at 285. By reviving *Gilbert*'s "facially nondiscriminatory" rationale, the Fourth Circuit's "neutral, pregnancy-blind policy" rule utterly subverts both the statutory text and expressed congressional intent.

The Fourth Circuit's disregard of the statutory text comes across particularly clearly when one examines the reasons the court gave for refusing to compare Young with the categories of employees whom UPS accommodates. The court refused to compare Young's treatment with that of employees with ADA-qualifying disabilities, because "her lifting

restriction is temporary and not a significant restriction on her ability to perform major life activities." App., *infra*, at 27a. Similarly, the court refused to compare Young's treatment with that of employees who lost DOT certification, because those employees face a legal obstacle to driving. *Id.* at 27a–28a.[4] But the *duration* of Young's restriction, its effect on *other* life activities, or the legal versus physical *nature* of the restriction do not answer the question the PDA asks: whether Young is "similar in the[] ability or inability *to work*" to employees who receive more favorable treatment, 42 U.S.C. § 2000e(k) (emphasis added).[5]

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[4] In fact, the loss of DOT certification would present no legal obstacle for the many UPS drivers, like Ms. Young, who drive minivans or small trucks, since these drivers are not *legally* required to possess commercial driver's licenses. This requirement is imposed pursuant to UPS policy, not law. *See Bates* v. *United Parcel Service, Inc.*, 511 F.3d 974, 983 (9th Cir. 2007) (en banc). But even leaving aside this factual issue, the Fourth Circuit's ruling cannot be squared with the statutory text.

[5] The PDA's legislative history reinforces the text's plain meaning. The Senate report explained that the key question for employers under the statute would be pregnancy's "functional comparability to other conditions," and that "the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). It concluded that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working." *Id.* And the House report addressed the precise situation of this case. It stated that "[t]he 'same treatment'" required by the statute "may include employer practices of

Young satisfies this test. Where an employee is unable to lift more than twenty pounds because of an ADA-qualifying disability or an injury that renders him ineligible for DOT certification, the summary judgment record indicates, UPS will accommodate that employee. But it refused to accommodate Young, even though she was "similar in the[] ability or inability to work." 42 U.S.C. § 2000e(k).

The Fourth Circuit's disregard of the statute is, if anything, even more apparent in its refusal to consider the accommodations that UPS concededly provides to workers injured on the job. The court's reason for that refusal was entirely tautological: "Finally, Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." App., *infra*, at 28a. But while Young may not be similar to such employees in the *source* of her inability to work, that is not the relevant question under the statutory text. The question is whether she is similarly able or unable to work as employees who receive accommodations for their on-the-job injuries. *See Johnson Controls*, 499 U.S. at 204 (holding that the PDA protects pregnant and potentially pregnant women who are "as capable of doing their jobs as their male counterparts"). Young was at least as able to work as those employees, and the Fourth Circuit did not deny that fact. Its refusal to compare Young to those employees flies in the face of the statute.

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transferring workers to lighter assignments," but that such practices must be "administered equally for all workers *in terms of their actual ability to perform work*." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978) (emphasis added).

Contrary to the Fourth Circuit's view, reading the PDA in accord with its plain text would not create a "preferential treatment mandate." App., *infra*, at 23a. To the contrary, it would merely guarantee the equal treatment the statute demands. It would simply require an employer that accommodates nonpregnant employees' work limitations to do the *same* for pregnant workers who are just as able to do the job. The Fourth Circuit's decision, by contrast, authorizes employers to treat pregnant workers *worse* than they treat other employees who are no more capable of doing the job. That holding cannot be reconciled with the text of the statute. Because the Fourth Circuit disregarded this Court's pronouncement that "the PDA means what it says," *Johnson Controls*, 499 U.S. at 211, this case demands the Court's review.

B. There is Longstanding Disagreement in the Circuits Regarding the Question Presented

Numerous commentators have noted the longstanding division in the lower courts regarding the question presented.[6] Indeed, the Fourth Circuit

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[6] *See* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 482–83 (2011) (describing a "circuit split" between the Tenth and Sixth Circuits, on the one hand, and the Eleventh and Fifth Circuits, on the other); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 191 (2004) ("Circuit courts are divided as to whether the precise comparison should be to employees similarly situated in their ability or inability to work regardless of the source of their injuries or to only those similarly abled employees suffering from nonoccupational injuries."); Jamie L. Clanton, Note, *Toward Eradicating*

itself noted the division and expressly "disagree[d]" with the Sixth Circuit's earlier decision to allow a similar PDA claim to proceed in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996). *See* App., *infra*, at 23a. The Sixth Circuit in *Ensley-Gaines* concluded that, "instead of merely recognizing that discrimination on the basis of pregnancy constitutes unlawful sex discrimination under Title VII," the PDA "provided additional protection to those 'women affected by pregnancy, childbirth or related medical conditions' by expressly requiring that employers provide the same treatment of such individuals as provided to 'other persons not so affected but similar in their ability or inability to work.'" *Ensley-Gaines*, 100 F.3d at 1226 (quoting 42 U.S.C. § 2000e(k)). This conclusion, of course directly conflicts with the Fourth Circuit's holding that the PDA must be read merely as "expand[ing] the category of sex discrimination (without otherwise altering Title VII)." App., *infra*, at 20a.

The Sixth Circuit expressly rejected a rule similar to the one the Fourth Circuit applied here, "that a plaintiff [must] demonstrate that the

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Pregnancy Discrimination at Work: Interpreting the PDA to 'Mean What it Says,' 86 IOWA L. REV. 703, 707 (2001) (stating that "[d]espite the Supreme Court's declaration in 1991 that 'the PDA means what it says,' there has been much confusion in lower courts as to how the PDA should be interpreted," and specifically identifying the dispute regarding the "shall be treated the same" language); Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 210–11 (2005) ("The Federal Circuits differ substantially in their approaches, and the United States Supreme Court has yet to identify a class of employees similarly situated to pregnant workers.").

employee who received more favorable treatment be similarly situated *in all respects*." *Ensley-Gaines*, 100 F.3d at 1226 (emphasis added) (internal quotation marks omitted). Instead, following the plain statutory text, the Sixth Circuit held that a PDA plaintiff "need only demonstrate that another employee who was similar in her or his ability or inability to work received the employment benefits denied to [the plaintiff]." *Id.* Again in direct conflict with the Fourth Circuit, the Sixth Circuit held that the accommodations the employer gave to workers injured on the job must be considered in the PDA analysis. *See id.* Despite obvious differences between pregnant workers and workers injured on the job, the Sixth Circuit concluded that those differences did not pertain "to an employee's ability or inability to work, as provided in the PDA." *Id.*[7]

The Fourth Circuit's decision is also inconsistent with the Tenth Circuit's decision in *E.E.O.C.* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000). In *Horizon/CMS*, the EEOC sued on behalf of pregnant nursing assistants who sought accommodations to their employer's lifting requirements. The employer denied their requests on the ground that it provided accommodations only to employees whose limitations resulted from an on-

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[7] The Sixth Circuit subsequently said that *Ensley-Gaines* "primarily dealt with whether a prima facie case had been established." *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 & n.1 (6th Cir. 2006). But even if *Reeves* is read as confining *Ensley-Gaines* to the prima facie context, *Ensley-Gaines* still conflicts with the decision here, as the Fourth Circuit held that Young did not even make out a prima facie case. *See* App., *infra*, at 25a–29a. In this respect, it is notable that the Fourth Circuit felt compelled to expressly disagree with, and not merely distinguish, *Ensley-Gaines*.

the-job injury. *See id.* at 1189–90. Because the EEOC identified two instances in which the employer had accommodated nonpregnant employees whose limitations did *not* result from on-the-job injuries, the court did not ultimately decide whether an employer that uniformly limited accommodations to such injuries could be liable under the PDA. *See id.* at 1195–96. But it did make two key rulings that are directly inconsistent with the Fourth Circuit's decision here.

First, unlike the Fourth Circuit, the Tenth Circuit did not ask why the employer had accommodated the two nonpregnant employees who had no on-the-job injury. The Tenth Circuit treated it as sufficient that the employer had accommodated those employees, whatever the reason. *See id.* at 1197 & n.8. Had the Fourth Circuit applied the same analysis, it could not have disregarded the accommodations UPS provides to workers with ADA-qualifying disabilities or DOT-disqualifying conditions. Second, where the Fourth Circuit concluded that UPS's on-the-job injury policy was a "neutral, pregnancy-blind policy" that prevented Young from establishing even a prima facie case of discrimination, *see* App., *infra*, at 27a, the Tenth Circuit explicitly said that "[e]vidence that pregnant women were treated differently from other temporarily-disabled employees" is sufficient at the prima facie stage. *Horizon/CMS*, 220 F.3d at 1195 n.7. The Tenth Circuit explained that if a plaintiff were, at that point in the analysis, "compared only to non-pregnant employees injured off the job," her case would be improperly "'short circuited' at the prima facie stage." *Id.* That conclusion directly contradicts the Fourth Circuit's holding here.

To be sure, the Fourth Circuit's decision accords in significant respects with rulings of the Fifth, Seventh, and Eleventh Circuits—though none of those cases went so far as to hold, as the lower court did here, that an employer that accommodates employees who lose DOT certification need not accommodate similarly impaired pregnant workers. *See Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011) (holding that there was no PDA violation where employer accommodated employees injured on the job and those with ADA-qualifying disabilities but not pregnant workers); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999) ("[A]n employer does not violate the PDA when it offers modified duty solely to employees who are injured on the job and not to employees who suffer from a non-occupational injury."); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) ("As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work-related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries."), *cert. denied*, 525 U.S. 1000 (1998).

Like the Fourth Circuit's decision here, two of these cases expressly disagreed with the Sixth Circuit's decision in *Ensley-Gaines*. *See Spivey*, 196 F.3d at 1313 n.2; *Urbano*, 138 F.3d at 207–08. And like the Fourth Circuit's decision, each of these cases blessed the denial of accommodations based on "pregnancy-blind" rules and thus disregarded both the statutory text and Congress's acknowledged

intent to overturn *Gilbert*.[8] This Court's intervention is necessary to resolve the disagreement in the circuits and to reaffirm that the PDA should be read in accordance with its plain text.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/Samuel R. Bagenstos/

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

APRIL 8, 2013

[8] *See Serednyj*, 656 F.3d at 548–49 (holding that employer's policy limiting accommodations to on-the-job injuries and ADA-qualifying disabilities "is 'pregnancy-blind,' and therefore valid"); *Spivey*, 196 F.3d at 1312–13 (holding that requiring employer that accommodates on-the-job but not off-the-job injuries to accommodate limitations arising from pregnancy would impermissibly "require that employers give preferential treatment to pregnant employees"); *Urbano*, 138 F.3d at 206–07 (finding it dispositive that "Continental treated Urbano in exactly the same way it would have treated any other worker who was injured off the job" and concluding that finding liability would "effectuate[] discrimination contrary to the PDA—in favor of pregnant employees").

No. 12-____

In The

Supreme Court Of The United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PEGGY YOUNG,
Plaintiff-Appellant

v.

UNITED PARCEL SERVICE, INC.,
Defendant-Appellee,
and
UNITED PARCEL SERVICE OF AMERICA, INC.; UPS HEALTH PROGRAM; AETNA LIFE INSURANCE COMPANY; AETNA DISABILITY AND ABSENCE MANAGEMENT,
Defendants.

No. 11-2078

AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND; A BETTER BALANCE; EQUAL RIGHTS ADVOCATES; LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER; LEGAL MOMENTUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; WOMEN'S LAW PROJECT
Amici Supporting Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Deborah K. Chasanow, Chief District Judge. (8:08-cv-02586-DKC)

Argued: October 24, 2012

Decided: January 9, 2013

Before WILKINSON, GREGORY, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Wilkinson and Judge Gregory joined.

COUNSEL

ARGUED: Sharon Fast Gustafson, Arlington, Virginia, for Appellant. Emmett F. McGee, Jr., JACKSON LEWIS, LLP, Baltimore, Maryland, for Appellee. **ON BRIEF:** Jill S. Distler, JACKSON LEWIS, LLP, Baltimore, Maryland, for Appellee. Ariela M. Migdal, Lenora M. Lapidus, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, New York, New York; Deborah A. Jeon, ACLU FOUNDATION OF MARYLAND, Baltimore, Maryland, for Amici Curiae.

OPINION

DUNCAN, Circuit Judge:

In 1978, Congress passed the Pregnancy Discrimination Act (the "PDA"), which amended the

definition of discrimination on the basis of sex in Title VII of the Civil Rights Act of 1964 ("Title VII") to provide that it included discrimination in employment "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Invoking both the PDA and the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, Peggy Young ("Young") appeals the district court's grant of summary judgment for her employer, United Postal Service, Inc. ("UPS"). For the reasons that follow, we affirm.[1]

I.

A.

In reviewing a grant of summary judgment, we recite the facts in the light most favorable to Young as the non-moving party. *Dulaney v. Packaging Corp. of America*, 673 F.3d 323, 324-25 (4th Cir. 2012). Three UPS policies lie at the core of this dispute. First, UPS defined among the essential functions for all drivers the ability to "[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to 70 pounds," and to "[a]ssist in moving packages weighing up to 150 pounds," J.A. 577.

Second, the applicable Collective Bargaining Agreement (the "CBA") provides temporary alternate work ("TAW")[2] to employees "unable to perform their normal work assignments due to an *on-the-job*

[1] The American Civil Liberties Union (the "ACLU") submitted an amicus brief in support of Young.

[2] We use TAW and light work duty interchangeably.

injury." J.A. 580 (emphasis added). To comply with this CBA provision, UPS offers light duty work to those employees injured while on the job or suffering from a permanent impairment cognizable under the ADA. Under UPS policy and the CBA, a pregnant employee can continue working as long as she can perform the essential functions of her job, but is ineligible for light duty work for any limitations arising solely as result of her pregnancy.

Finally, a CBA provision requires UPS to give an "inside job" to drivers who have lost their certification by the Department of Transportation (the "DOT") because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident as long as the driver is capable of performing such a job. Because an inside job often involves heavy lifting, it is typically not considered light duty work.

Against this backdrop, we turn to the facts before us. We begin with a general statement of facts, providing additional information as necessary to the analysis.

Young started working for UPS in 1999, and began driving a delivery truck in 2002. By 2006 and throughout the relevant period, Young held a position as a part-time, early morning driver, also known as an "air driver," apparently in reference to her responsibility to pick up and deliver packages that had arrived by air carrier the previous night. Young worked out of a UPS facility in Landover, Maryland known as the "D.C. Building." Each morning after clocking in at the D.C. Building and inspecting her delivery van, Young and other air drivers would meet a shuttle from the airport bearing letters and packages scheduled for immediate

delivery. Air drivers were then responsible for loading their vans and making deliveries. Young typically finished her work responsibilities by 9:45 or 10 in the morning, and then proceeded to her second job at a flower delivery company.

In July 2006, following two unsuccessful rounds of *in vitro* fertilization, Young requested a leave of absence to try a third round. The UPS occupational health manager, Carolyn Mar- tin, granted Young's request. When Young became pregnant, she sought to extend her leave. At some point in September 2006, she left with her supervisor a note from Dr. Thaddeus Mamlenski indicating that she should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter. Young soon followed up with a phone call to Martin saying that she was not yet ready to return to work.

During that September 2006 call, Martin informed Young that UPS policy would not permit her to continue working as long as she had the twenty-pound lifting restriction. Young maintains that she sought to explain to Martin that her job rarely required her to lift over twenty pounds, that other UPS employees had in any case agreed to assist her, and that she was willing to do either light duty work or her regular job. Young characterized the seventy-pound lifting requirement as illusory because she rarely had to transport large packages, and when she did, she could use a hand truck or request assistance from other UPS employees.

On October 11, 2006, Young had a check-up with midwife Cynthia Shawl. At the conclusion of her check-up, Shawl drafted and signed a short note on

National Naval Medical Center letterhead stating "Peggy Sue Young is currently pregnant and due to deliver on or about May 2, 2007. Due to her pregnancy it is recommended that she not lift more than 20 pounds." J.A. 510 (the "Shawl note"). The Shawl note also indicated Shawl was available to provide further information or answer questions, and listed contact information for her. Although Shawl did not typically draft such notes, she did so in this instance because Young had told her she needed "a letter for work stating her restrictions." J.A. 656.[3]

At some point after her appointment with Shawl, Young contacted her supervisor at the D.C. Building and requested to return to work. When Young informed her supervisor of the note recommending she not lift more than twenty pounds, her supervisor referred Young to Martin. After speaking with Young, Martin concluded that, based on UPS policy, Young was unable to perform the essential functions of her job and was ineligible for light duty assignment. It is undisputed that Martin made this determination alone.

Young and Martin spoke by phone at the end of October 2006. In the course of discussing Young's lifting limitation and eligibility for work, Martin explained to Young that (1) UPS offered light duty for those with on-the-job injuries, those accommodated under the ADA, and those who had

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[3] The chronological record of medical care indicates Shawl saw Young for 40 minutes and includes the notation "Released w/o Limitations." J.A. 509. Although Young emphasizes in her brief the tension between the Shawl note and the "Released w/o Limitations" notation, she does not suggest, and the record does not support, the conclusion that Martin or anyone at UPS ever saw the "Released w/o Limitations" notation.

lost DOT certification, but not for pregnancy; (2) Young did not qualify for short-term disability benefits because she had presented no note stating she could not work at all; (3) Young had exhausted her leave under the Family and Medical Leave Act (the "FMLA"); and (4) UPS policy did not permit Young to continue working as an air driver with her twenty-pound lifting restriction. Although Martin "empathize[d] with [Young's] situation and would have loved to help her," J.A. 1032, Martin believed she was required to treat Young the same as she would any other UPS employee who had a lifting restriction that did not result from an on-the-job injury or ill- ness and who could not perform his or her regular job. According to Martin, she would have allowed Young to return to work if Young could provide a medical certification removing her lifting restriction and stating she could perform the essential functions of her job.

The parties do not dispute that Martin based her decision to disallow Young from returning to work solely on the basis of the lifting limitations imposed by Mamlenski and Shawl. Martin did not believe Young had any other restrictions, and asserts that had she considered Young disabled within the meaning of the ADA, she would have encouraged Young to apply for an accommodation in accordance with UPS's ADA policy. J.A. 575. Although Young takes issue with Martin's failure to contact Shawl and seek more information regarding the recommended lifting restriction, Young does not controvert Martin's assertion.

Still seeking to return to work, Young approached Myron Williams, the Capital Division Manager in the D.C. Building, in November 2006.

According to Young, when she explained her desire to return to work, Williams told her she was "too much of a liability" while pregnant and that she "could not come back into the [D.C.] [B]uilding until [she] was no longer pregnant." J.A. 500.

By November 2006, Young's FMLA leave had expired. She then went on an extended leave of absence, receiving no pay and eventually losing her medical coverage by the end of the year. During this extended leave, someone—the record does not disclose who—at UPS ascribed Young's absence to "disability" by placing the code for disability on her attendance chart. A UPS employee explained at his deposition that the disability code does not necessarily mean that the employee is on approved disability leave; it in some cases means only that an employee is "not working because of an off the job situation." J.A. 1836.

Young gave birth on April 29, 2007, and returned to work for UPS at some point thereafter.

B.

Young filed a charge with the Equal Employment Opportunity Commission (the "EEOC") on July 23, 2007, and later amended it. She alleged discrimination on the basis of race,[4] sex, and pregnancy. After the EEOC issued Young a right to sue letter in September 2008, she filed suit in October 2008. In an amended complaint filed the same month, Young sought damages for sex and race discrimination under Title VII and for disability

[4] Young is white, and alleged that UPS permitted African-American pregnant employees to work.

discrimination under the ADA. When Young sought to amend her complaint a third time in June 2009 to add a distinct disparate impact claim, the district court denied her motion.

Following over eighteen months of discovery, UPS moved for summary judgment in July 2010. In addition to responding in opposition to UPS's summary judgment motion, Young also sought to compel additional discovery, asked for a continuance under Rule 56(d) of the Federal Rules of Civil Procedure, and moved to dismiss voluntarily her race discrimination claim. In an opinion issued in February 2011, the district court granted summary judgment for UPS and denied Young's motions for additional discovery, a continuance, and a dismissal of her race discrimination claim.[5] On Young's ADA claim, the district court reasoned that UPS had not discriminated against Young either by asking for a doctor's note, which it was permitted to do under the circumstances, or by deciding not to accommodate her.

Applying the Title VII burden shifting analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to Young's PDA claim, the district court concluded Young had not shown direct evidence of discrimination; failed to establish a prima facie case of sex discrimination because she could identify no similarly situated comparator who received more favorable treatment than she did; and in any case could not show that UPS's non-discriminatory rationale for its decision was

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[5] The district court granted summary judgment in favor of UPS on Young's race discrimination, and Young does not challenge this on appeal.

pretextual.

The district court denied Young's motion for reconsideration in August 2011. This appeal followed.

II.

Young challenges the district court's grant of summary judgment on her ADA and PDA claims. First, she claims that UPS impermissibly regarded her as disabled under the ADA. Second, Young contends that UPS discriminated against her on the basis of pregnancy in violation of the PDA.[6] In considering these arguments, we review the district court's grant of summary judgment de novo, and construe all the documentary evidence and inferences available therefrom in the light most favorable to Young. *See Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). Summary judgment is appropriate if UPS establishes "that there is no genuine dispute as to any material fact." Fed. R. Civ.

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[6] Young also makes two arguments we need not consider at length. First, she contends that the district court erred by denying her motion to amend her complaint to include a disparate impact claim. *See* Appellant's Br. at 65-66. We review a district court's decision to deny a motion to amend for abuse of discretion, *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 192 (4th Cir. 2009), and find no such abuse here. Young failed to satisfy the good cause standard under Fed. R. Civ. P. 16(b)(4) to modify the scheduling order. J.A. 126. Second, Young asserts error in the district court's decision to deny her motion to compel additional discovery. The district court had permitted over eighteen months of discovery, and had already twice granted Young's motions to compel. Its decision to cut off discovery when it did was not an abuse of discretion.

P. 56(a). Thus, a genuine issue of material fact, and not simply "the mere existence of *some* alleged factual dispute between the parties," *Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986), is required to defeat UPS's motion. We turn first to Young's ADA claim.

A.

The ADA prohibits discrimination against "a qualified individual on the basis of disability." 42 U.S.C. § 12112(a).[7] To establish disability discrimination, Young must demonstrate that (1) she had a disability as defined in the ADA; (2) she was a "qualified individual," which entails being able to perform the essential functions of her job; and (3) UPS took an adverse action against her on account of her disability. *See Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 (4th Cir. 1997). Young's claim fails because she cannot establish the first of these

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[7] Congress amended the ADA in 2008 in order to expand the category of individuals who fall within its ambit. *See* ADA Amendments Act of 2008 (the "ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553; *see also Reynolds v. American Nat'l Red Cross*, ___ F.3d ___, No. 11-2278, 2012 WL 6062702, at *5 (4th Cir. Dec. 7, 2012) ("In passing the ADAAA, Congress was concerned 'lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.'" (quoting ADAAA, 122 Stat. at 3553)). Because Young filed her claim before the effective date of the amendments, which Congress did not make retroactive, *Reynolds*, 2012 WL 6062702, at *6 (ADAAA not retroactive to cases filed before its enactment); *see also Boitnott v. Corning Inc.*, 669 F.3d 172, 174 n.3 (4th Cir. 2012) (same), we do not consider how, if at all, the ADAAA's amendments would affect Young's ADA claim.

elements.[8]

The ADA provides three avenues for establishing the existence of a disability: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). Young does not press the argument that her pregnancy alone establishes disability. *See, e.g., Wenzlaff v. NationsBank*, 940 F. Supp. 889, 890 (D. Md. 1996) ("With near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA."). Rather, she contends that UPS regarded her pregnancy-related work limitations as such.

A "regarded as" disabled claim "includes the circumstance when the employer 'mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.'" *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 384-85 (4th Cir. 2008) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)). Thus, the employer "must believe . . . that [an individual] has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton*, 527 U.S. at 489. Major life activities are "those activities that are of central importance to daily life," such as walking, seeing, and hearing. *Toyota Motor Mfg., Kentucky, Inc. v.*

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[8] Because Young's claim founders at the first prong, we do not decide whether Young was a "qualified individual" or whether the ADA's "reasonable accommodation" requirement attaches to those who are regarded as disabled.

Williams, 534 U.S. 184, 197 (2002).[9] Finally, where an employee relies on a "regarded as" disabled theory, we focus "on the reactions and perceptions of the employer's decisionmakers . . . ." *Wilson*, 513 F.3d at 385 (quoting *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 172-73 (4th Cir. 1997), *abrogated on other grounds by Bragdon v. Abbott*, 524 U.S. 624 (1998)) (internal alteration omitted).

Young identifies three actions on Carolyn Martin's part as evidence that UPS regarded her as disabled: soliciting from Young a doctor's opinion that she was no longer under any lifting limitations; preventing Young from working based only on the Shawl note without independently evaluating Young's ability to work or contacting Shawl for more information; and improperly relying on a mistaken belief about Young's capacity for work. We briefly consider each.

The argument that Martin improperly solicited the doctor's opinion is unclear. The record reflects no evidence that Young provided such an opinion to anyone.[10] The only doctor's notes in the record are those from Dr. Mamlenski and midwife Cynthia Shawl, suggesting Young lift no more than twenty pounds. Thus, to the extent Young either

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[9] Both *Toyota Motor Mfg.* and *Sutton* interpret the ADA before the 2008 amendments. Although the ADAAA effectively overruled the interpretation offered in these cases, we consider them because we analyze Young's claims under the pre-2008 ADA. *See supra* note 7.

[10] The district court had the same concern, noting that Young had not pleaded in her amended complaint the claim that UPS had improperly solicited a doctor's note from her. J.A. 417.

claims Martin improperly solicited the Shawl note or takes issue with Mar- tin's request that Young provide medical certification that she was no longer under the lifting restrictions indicated in the notes from Mamlenski and Shawl, we agree with the district court's view that "[b]ecause UPS possessed objective facts suggesting Young might have lost the ability to perform central job functions, it had a legitimate reason to seek some verification that Young had recovered her ability to perform those duties." J.A. 420; *see also Porter v. U.S. Alumoweld Co.*, 125 F.3d 243, 247 (4th Cir. 1997) (holding employer's medical inquiry was job-related and consistent with business necessity when employee returned to job involving lifting after back surgery).

Young's second contention—that UPS had a duty to seek additional information from her healthcare providers and independently evaluate her ability to work—is similarly unavailing. In Young's view, UPS should have engaged in an interactive process to determine whether Young was capable of performing her job. Although the ADA does advise an employer to initiate "an informal, interactive process" when determining whether an individual with a disability needs an accommodation, *see* 29 C.F.R. § 1630.2(o)(3), no such counsel applies to the determination of whether an employee is disabled in the first instance. Young presents no rationale, compelling or otherwise, for concluding that an employer acts inappropriately in relying on the employee's own objective medical evidence. *Cf. Breitkreutz v. Cambrex Charles City, Inc.*, 450 F.3d 780, 784 (8th Cir. 2006) ("If a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the

disabled and does not establish a perception of disability.").[11]

Finally, Young fails to marshal evidence creating a genuine issue of material fact on the question of whether Martin had a mistaken belief regarding Young's capacity for work. Young offers no evidence indicating Martin believed Young's pregnancy substantially limited one or more of her major life activities. The most the record establishes is that Martin believed Young to be pregnant and under a temporary lifting restriction on account of her pregnancy, based on the evidence Young herself provided. Given the relatively manageable weight restriction—twenty pounds—and the short duration of the restriction, there is no evidence that Young's pregnancy or her attendant lifting limitation constituted a disability within the meaning of the ADA. *See Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996) ("[W]e hold, as a matter of law, that a twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."), *abrogated on other grounds by Baird ex rel. Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999); *Pollard v. High's of Baltimore*, 281 F.3d 462, 468

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[11] Although the two documents produced by Cynthia Shawl—the "Released w/o Limitations" notation and the Shawl note—stand in considerable tension, nothing in the record indicates anyone from UPS ever saw the former document. Having no reason to believe Young's doctor-recommended lifting restriction had abated, Martin was under no obligation to consult with Shawl or otherwise seek out more information.

(4th Cir. 2002) ("[T]emporary impairments usually do not fall within the ADA's definition of 'disability.'"). Because Young points to no more than the objective fact of her pregnancy, and offers no evidence tending to show that Martin subjectively believed Young to be disabled, Young cannot adduce evidence to raise a factual issue on her "regarded as" claim.[12]

B.

We turn next to the heart of Young's appeal, that UPS violated the Pregnancy Discrimination Act. Although not free from ambiguity, Young's core contention appears to be that the UPS policy limiting light duty work to some employees—those injured on-the-job, disabled within the meaning of the ADA, or who have lost their DOT certification—but not to pregnant workers like Young violates the PDA's command to treat pregnant employees the same "as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). In a similar vein, the ACLU amicus brief argues that the PDA requires employers like UPS to provide pregnant workers like Young light duty work so long as it does so for any other workers similar in their ability or inability to work even though it concededly does not do so for all nonpregnant employees.

We analyze a PDA claim as a sex

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[12] The fact that Young was coded as "disabled" standing alone does not alter this conclusion because there is no evidence in the record linking this coding to a decisionmaker who worked with Young. *See Wilson*, 513 F.3d at 385.

discrimination claim under Title VII. *DeJarnette v. Corning Inc.*, 133 F.3d 293, 297 (4th Cir. 1998) ("A claim of discrimination on the basis of pregnancy must be analyzed in the same manner as any other sex discrimination claim brought pursuant to Title VII." (quoting *Boyd v. Harding Academy*, 88 F.3d 410, 413 (6th Cir. 1996) (internal alteration omitted))). Applying the usual Title VII analytical construct for sex discrimination claims, we first consider whether Young has shown any direct evidence of discrimination. *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 959 (4th Cir. 1996). In the absence of that, we apply the familiar burden shifting framework articulated in *McDonnell Douglas* and subsequent cases. As Young's counsel clarified at oral argument, Young challenges the UPS policy as both direct evidence of discrimination and under the *McDonnell Douglas* framework. Accordingly, we assess the policy in both contexts.

1.

In asserting direct evidence of discrimination, Young points to both the UPS policy and to disparaging comments from Myron Williams as indicative of UPS's general corporate animus against pregnant employees. Evidence is direct if it "both reflect[s] directly the alleged discriminatory attitude and . . . bear[s] directly on the contested employment decision." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520 (4th Cir. 2006) (quoting *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc)). Thus, evidence is direct if it establishes discriminatory motive with no need for an inference or a presumption. We first consider the

challenge to the UPS policy.

a.

Young contends that the UPS policy that does not provide light duty work to pregnant workers but does for certain other employees constitutes direct evidence of discrimination. It is certainly true that an explicit policy excluding pregnant workers would violate antidiscrimination law. *See* 29 C.F.R. § 1604.10(a) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII."). But no such policy exists here. By limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification, UPS has crafted a pregnancy-blind policy, and Young does not contend otherwise. Such a policy is at least facially a "neutral and legitimate business practice," and not evidence of UPS's discriminatory animus toward pregnant workers. *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 297 (4th Cir. 2010).

Young and the ACLU argue, however, that UPS's policy of accommodating certain employees but not pregnant workers who are otherwise allegedly similar in their ability or inability to work nonetheless runs afoul of the PDA. In particular, the ACLU contends that the PDA explicitly alters the traditional sex discrimination analysis under Title VII by restricting the basis upon which employers may compare pregnant workers with nonpregnant workers. At its core, this argument posits that the

PDA creates a cause of action distinct from that of § 703(a)[13] by compelling employers to grant pregnant employees a "most favored nation" status with others based on their ability to work, regardless of whether such status was avail- able to the universe—male and female—of nonpregnant employees. Considering the history and structure of the PDA and the consequences of interpreting it in this way, we cannot agree.

Passed in 1978 to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the PDA added pregnancy-related discrimination to Title VII's general prohibition on sex discrimination. Congress placed the entirety of the PDA into the "Definitions" section of Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, child- birth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

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[13] Section 703(a) prohibits employers from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment [ ] because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1).

42 U.S.C. § 2000e(k). As the Supreme Court subsequently recognized, the PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

In addition to including pregnancy-related conditions within the definition of sex discrimination in its first clause, the PDA's second clause provides that "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Standing alone, the second clause's plain language is unambiguous. *See Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-05 (1991) ("The second clause could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability to work." (quoting *California Fed. Savings and Loan Ass'n. v. Guerra*, 479 U.S. 272, 297 (1987) (White, J., dissenting) (internal alterations omitted))). But the second clause does not stand alone; it follows the first clause. Confusion arises when trying to reconcile language in the first clause suggesting the PDA simply expands the category of sex discrimination (without otherwise altering Title VII), and language in the second clause suggesting the statute requires different—perhaps even preferential—treatment for pregnant workers.

Although the second clause can be read broadly, we conclude that its placement in the definitional section of Title VII, and grounding

within the confines of sex discrimination under § 703, make clear that it does not create a distinct and independent cause of action. We further note the anomalous consequences a contrary position would cause: pregnancy would be treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII.

Most courts to have considered the potential incongruence between the PDA's first and second clauses have concluded similarly. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . ." (citation omitted)); *see also Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enter., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998) ("By defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than 're-establish principles of Title VII law as they had been understood prior to the *Gilbert* decision,' and ensure that female workers would not be treated 'differently from other employees simply because of their capacity to bear children.'" (citations omitted)); *but see Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) ("[W]hen a Title VII litigant alleges discrimination on the basis of pregnancy in violation of the PDA, in order to establish a prima

facie case of discrimination, she must demonstrate only that another employee who is similarly situated in her or his ability or inability to work received more favor- able benefits."). These courts reason that to find otherwise would be to transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees.

Interpreting the PDA in the manner Young and the ACLU urge would require employers to provide, for example, accommodation or light duty work to a pregnant worker whose restrictions arise from her (off-the-job) pregnancy while denying any such accommodation to an employee unable to lift as a result of an off-the-job injury or illness. Under this interpretation, a pregnant worker who, like Young, was placed under a lifting restriction by her healthcare provider and could not work could claim that the PDA requires that she receive whatever accommodation or benefits are accorded to an individual accommodated under the ADA, because the pregnant worker and the other individual are similar in their ability or inability to work—i.e., they both cannot work. By contrast, a temporary lifting restriction placed on an employee who injured his back while picking up his infant child or on an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter would be ineligible for any accommodation. Such an interpretation does not accord with Congress's intent in enacting the PDA, *see Armstrong v. Flowers Hosp.*, 33 F.3d 1308, 1317 (11th Cir. 1994) ("Statements in the legislative history make it clear that the PDA does not require employers to extend

any benefit to pregnant women that they do not already provide to other disabled employees."), and would thus imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted, *see Urbano*, 138 F.3d at 208 ("[Plaintiff]'s claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA.").

We are unpersuaded that *Ensley-Gaines*, on which Young and the ACLU as amicus rely, effects the watershed change they ascribe to it. Although the court in *Ensley-Gaines* stated the second clause "explicitly alters the analysis to be applied in pregnancy discrimination cases," 100 F.3d at 1226, it analyzed the plaintiff's challenge to the United States Postal Service's policy—a policy akin to the one challenged here—not as direct evidence of sex discrimination, but as circumstantial evidence under the *McDonnell Douglas* framework. *See Reeves*, 446 F.3d at 641 n.1 (noting *Ensley-Gaines* primarily concerned whether the plaintiff had established a prima facie case under the Title VII analysis). Moreover, given the troubling consequences just outlined of interpreting the PDA in this broad manner, *see Urbano*, 138 F.3d at 208 ("The impact of *Ensley-Gaines* is unequivocally to treat pregnant employees who need light duty work better than other employees with a similar medical need whose conditions arose off-the-job."), it is unsurprising that no other circuit has followed *Ensley-Gaines*. We are similarly compelled to disagree with its analysis.

We therefore adhere to the majority view that where a policy treats pregnant workers and nonpregnant workers alike, the employer has

complied with the PDA. The UPS policy at issue is not direct evidence of pregnancy-based sex discrimination.

b.

We next consider whether Myron Williams's comments demonstrate "corporate animus" on the part of UPS tantamount to direct evidence of discrimination.[14] Young focused below on Williams's comments alone, but now contends those comments amount to evidence of UPS's "corporate animus." The district court rejected her previous argument on the ground that Williams wielded no decisionmaking power over Young.[15] *See* J.A. 402; *see also Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288-89 (4th Cir. 2004) (noting that although "the person allegedly acting pursuant to a discriminatory animus need not be the 'formal decision-maker' to impose liability upon an employer for an adverse employment action," the plaintiff must present "sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action"). Young's argument on appeal that Williams's

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[14] Although Williams denies telling Young that her pregnancy made her a liability and that she should return home until she was no longer pregnant, the procedural posture of this case requires us to accept as true Young's account.

[15] In fact, Young argues that "it is misguided to look to *either* Martin *or* Williams as 'the' decisionmaker;" each of them was simply "enforc[ing] [UPS's] standing policy by announcing that Young must go home." Appellant's Br. at 54. Thus, Young's "corporate animus" argument is in essence another attack on UPS's policy.

comments manifest UPS's corporate animus towards pregnant workers finds no support in the record; Williams's statements stand alone as the only explicit evidence of a pregnancy-related comment, derogatory or otherwise. Moreover, Young's reliance on *Merritt*, 601 F.3d 289, and *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), is inapposite as those cases involved non-decisionmaker colleagues whose pervasive animus for the plaintiff influenced the ultimate decisionmaker. No such evidence exists here: Williams neither possessed the authority to make determinations about Young's employment nor sought to influence Martin, who did.[16]

2.

Because Young presents no direct evidence of pregnancy discrimination, we next consider whether she offers evidence sufficient to make out a prima facie case under the *McDonnell Douglas* framework. Under this framework, Young must establish a prima facie case of sex discrimination on her pregnancy claim by showing "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated

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[16] The single statement Young offers from a co-worker suggesting "no-body would have stopped" a manager like Williams from placing Young on light duty because "[t]hat is just how it works," *see* J.A. 539, is insufficient to create a genuine issue of disputed material fact. Even assuming Williams did have such authority to decide whether Young should be given light duty, Young offers no reason to conclude that he would or should have interpreted UPS policy regarding the availability of light duty for pregnant employees any differently than Martin did.

employees outside the protected class received more favorable treatment." *Gerner v. Cnty. of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012) (quoting *White v. BFI Waste Servs., LLC*, 375 F.3d 288, 295 (4th Cir.2004)) (internal alterations omitted).[17] Again, the focus of her challenge is the UPS policy.

Young fell within the protected class, raised at least a genuine issue of material fact regarding her job performance,[18] and suffered an adverse employment action when she could not continue working. Thus, the dispute here centers on the final element of the prima facie case: whether similarly-situated employees outside the protected class received more favor- able treatment than Young, or more broadly, whether UPS's decision to prevent Young from either receiving an accommodation or returning to work occurred "under circumstance[s] giving rise to an inference of unlawful

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[17] We have also described the fourth prong as considering whether the allegedly adverse employment action occurred "under circumstance[s] giving rise to an inference of unlawful discrimination." *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004).

[18] UPS argues that Young cannot satisfy the second element of the prima facie case because the lifting restriction rendered her unqualified for an air driver position. *See* Appellant's Br. at 48-51. UPS raised this argument below, *see* J.A. 168-69, but the district court did not address it. Although there is (out-of-circuit) case law supporting UPS's position, *see Spivey*, 196 F.3d at 1312 ("The [twenty-five pound] lifting restriction imposed on [the plaintiff] clearly prevented her from performing the responsibilities required of this position."), the record also indicates Young may have been able to perform satisfactorily even with the restriction. At a minimum, this is a disputed issue of material fact inappropriate for a court to decide at the summary judgment stage.

discrimination." *Mackey*, 360 F.3d at 468. In particular, Young and UPS sharply disagree about who constitutes an appropriate "comparator" in this context.

At bottom Young seeks to compare herself to employees accommodated under the ADA, drivers who have lost their DOT certification for medical reasons, and employees injured on the job. As we have already noted, however, these accommodations were created by a neutral, pregnancy-blind policy—a policy she can attack indirectly no more successfully than she could directly.

Moreover, we conclude that a pregnant worker subject to a temporary lifting restriction is not similar in her "ability or inability to work" to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job. Young is dissimilar to an employee disabled under the ADA for the same reason she herself was not disabled: her lifting limitation was temporary and not a significant restriction on her ability to perform major life activities. She is unlike employees guaranteed an inside job or light duty under the CBA provision[19] for drivers who have lost DOT certification for at least two reasons. First, no legal obstacle stands between her and her work. A driver who has lost his or her DOT certification is legally disabled from operating a vehicle; Young's physical impairment only restricted her ability to lift. Second, as the

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[19] Although Young also contends that the CBA was negotiated and interpreted with discriminatory animus, she presents no support for this contention in the record.

district court observed, "those with DOT certification maintained the ability to perform any number of demanding physical tasks, while Young labored under an apparent inability to perform tasks involving lifting." J.A. 411. Finally, Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury. The CBA provision requiring UPS to accommodate those employees injured while carrying out job duties for the company but not while pursuing other activities reasonably places a heightened obligation on UPS to accommodate the former group. The PDA does not render this distinction unlawful.

We are also unpersuaded that Martin's decision occurred under circumstances "giving rise to an inference of unlawful discrimination." *Mackey*, 360 F.3d at 468. According to Young, these circumstances consist of (1) Martin's solicitation of a doctor's note from Young identifying her restrictions; (2) Martin's statement that UPS policy did not provide light duty for pregnant workers; and (3) Williams's comments about Young as a liability while pregnant. However, with the exception of Williams's comments, which played no role in Martin's decision, these facts fail to demonstrate the specific animus Young ascribes to them. Even assuming Martin solicited a note from Young, there is no indication that this was not done with all employees returning from leave, or that Martin did so *because* Young was pregnant. And Martin's statement about UPS's policy providing light duty in three instances—but not for pregnancy—is simply one of fact. One may characterize the UPS policy as insufficiently charitable, but a lack of charity does not amount to

discriminatory animus directed at a protected class of employees.

Accordingly, we conclude that Young cannot establish that similarly situated employees received more favorable treatment than she did, and therefore cannot establish the fourth element of the prima facie case for pregnancy discrimination. While not unsympathetic to Young's circumstances, we are nevertheless concerned about the problematic potential of creating rights not grounded in the text and structure of Title VII as a whole.

III.

We therefore affirm the decision of the district court.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG

v. Civil Action No. DKC 08-2586
February 14, 2011

UNITED PARCEL SERVICE, INC.

MEMORANDUM OPINION

Peggy Young, employed as a part-time morning driver by United Parcel Service, Inc. ("UPS"), sued the company in 2008 for allegedly discriminating against her because of her gender, race, and perceived disability. UPS has moved for summary judgment. (ECF No. 60). A number of other motions are also pending, including a motion to dismiss in part (ECF No. 69) filed by Young; two motions to seal (ECF Nos. 77, 93); a motion to compel (ECF No. 78) filed by Young; and a motion to continue (ECF No. 80) filed by Young. The issues have been fully briefed and no hearing is necessary. *See* Local Rule 105.6. For the reasons that follow, the motion to dismiss in part will be denied, the motion to compel will be denied, and the motion to continue will be denied. The motion for summary judgment will be granted, as will the two motions to seal.

I. Background

A. Factual Background

The following facts are undisputed unless otherwise stated.

1. The Plaintiff: Peggy Young

UPS hired Young in 1999. In January 2002, Young started driving a delivery truck for the company. (Young Dep., 40, 65; ECF No. 76-16 ¶ 1). During the time relevant to this case – primarily the years 2006 and 2007 – Young worked as a part-time, early-morning "air driver." (Young Dep., at 65, 114-15; ECF No. 76-16 ¶ 3).[1] As an air driver, Young often carried lighter letters and packs, as opposed to heavier packages. "Air delivery is more expensive by weight than ground delivery. Therefore, heavier packages tend to be sent by ground delivery, and lighter packages tend to be sent by air delivery." (ECF No. 76-4 ¶ 1; *see also* ECF Nos. 76-11, at 3; 76-18, at 8). At least on some infrequent occasions, however, Young's deliveries would also include heavier boxes.[2] (Young Dep., at 67; ECF Nos. 76-16 ¶ 3; 76-18, at 8).

Because they were sometimes called upon to

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[1] Young worked out of a facility in Landover, Maryland known as the "D.C. Building. (Young Dep., at 66; ECF No. 76-16 ¶ 2).

[2] Young submitted records showing that between November 2008 and June 2009, for instance, she made 76 deliveries weighing more than 20 pounds. (ECF No. 76-7 ¶ 6). At least 12 deliveries were greater than 50 pounds. (*Id.* ¶ 9).

deliver heavier packages, air drivers like Young were required by UPS to be able to "lift, lower, push, pull, leverage and manipulate" items "weighing up to 70 pounds." Air drivers also needed to be able to "[a]ssist in moving packages weighing up to 150 pounds." (ECF No. 76-26, at 23; *see also, e.g.*, ECF Nos. 60-5 ¶ 10; 60-9 ¶ 2; 60-4, at 47; 60-10, at 4-5). Young recognized that UPS "require[d] [her] to lift 70 pounds." (Young Dep., at 45, 52-53). She argues that the 70-pound lifting requirement was "illusory" because packages heavier than 20 pounds were infrequent (ECF No. 76-11 ¶ 11), she was able to use a hand truck (Young Dep., at 572), and other employees could and sometimes did take heavy packages for her (*e.g.*, ECF No. 76-15 ¶ 5). She observes that several other UPS jobs have similar 70- pound "lifting" requirements, even though the jobs did not in actuality require heavy lifting - at least in her view. (*See* ECF No. 76-27, at 19 (operations clerk), 21 (loader/unloader), 23 (auto painter)).

In 2006, early-morning air drivers like Young would begin their workday at 6:30 a.m. (Young Dep., at 74). After arriving at the D.C. Building and clocking in, Young would inspect her delivery van. (Young Dep., at 74-75). Once finished with the inspection, Young would gather with other early-morning drivers to meet a shuttle that arrived from the airport bearing packages. (Young Dep., at 75). Together, the delivery drivers, including Young, "jumped up and unloaded" the packages from the shuttle van into their individual delivery vans.[3]

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[3] In a later statement, however, Young says that loading

(Young Dep., at 78-80). Young would load her own van and was expected to load and deliver - on her own - any packages under 70 pounds that were not oddly shaped. (Young Dep., 81-82). Young was ultimately responsible for delivering any packages of any weights that the customers sent. (Young Dep., at 85-86; ECF Nos. 76-17, at 4; 60-10, at 2). She had no control over which packages she was given to deliver on her route. (Young Dep., 75, 80, 85-86).

After the van was loaded, Young would begin making her deliveries. (Young Dep., at 82). Young ordinarily drove a route covering Annapolis, Davidsonville, and Calvert County (Young Dep., at 68; ECF No. 76-16 ¶ 3), delivering generally lighter letters and packs by 8:30 a.m.. (Young Dep., at 67; ECF No. 76-16 ¶¶ 3, 66). Sometimes, particularly on Saturdays, she would also make deliveries in Washington. (Young Dep., at 68). She would usually make five to twenty deliveries each day. (ECF No. 76-16 ¶ 66).

After finishing her deliveries, Young would meet a full- time driver to take additional "air" packages off his vehicle and deliver them by the 8:30 a.m. deadline. (Young Dep., at 69, 73, 85). She would then return with her van to the D.C. Building. (Young Dep., at 86). Young's day at UPS would end around 9:45 a.m. (Young Dep., at 86), after which she would punch out and go to her second job at a flower delivery company. (Young Dep., at 87).

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and unloading vans was not "part of [her] regular job" in 2005 and 2006. (ECF No. 76-16 ¶ 66).

2. The Defendant: United Parcel Service, Inc.

UPS is a package delivery service that employs 318 drivers at the D.C. Building, 14 of whom are part-time female drivers like Young. (Brien Dep., Ex. 1). Many of these employees, including Young (Young Dep., at 105), were covered by a Collective Bargaining Agreement ("CBA"). Young's arguments implicate many provisions of the CBA, in addition to certain other policies and procedures at UPS.[4]

Under Article 14, Section 2 of the CBA, UPS must give temporary work assignments to CBA-covered employees who are unable to perform their regular jobs because of on-the-job injuries. (ECF Nos. 60-5 ¶ 3; 60-7, at 2-3). These temporary assignments are generally limited to 30 days and are meant to help return the employee to regular work as soon as possible. (ECF Nos. 60-5 ¶ 3; 60-7, at 2-4). Unless an employee suffers an on-the-job injury, the stated policy of UPS is to permit light-duty accommodations only where "an employee has a qualifying disability within the meaning of the ADA which prevents him/her from being able to perform some aspect of his/her job." (ECF No. 60-5 ¶¶ 4-5; *see also* ECF No. 60-7, at 4). Thus, UPS's policy is that an employee who is unable to perform an essential

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[4] Young makes several "factual" allegations regarding UPS's supposed unwillingness to assume voluntary obligations in the CBA concerning its pregnant employees. (ECF No. 70-1, at 20-21). Even taken as true, such facts need not be considered.

function of the job would be required to take a leave of absence (if the inability stemmed from something off-the-job). (ECF No. 60-5 ¶ 6).

UPS's general policy is to treat pregnancy just like any other off-the-job injury or condition. (*See, e.g.*, No. 60-4, at 51 ("UPS does not offer light duty to any employee, male or female, who has any medical condition not related to work, pregnancy included."); *cf.* 85-3 ¶ 3). Thus, "[p]regnant employees were permitted to continue working as long as they wanted to during their pregnancies, unless and until the employee presented a doctor's note or other medical certification that she had a restriction that rendered her unable to perform the essential functions of the job." (ECF No. 60-5 ¶ 7). Many delivery drivers, for instance, do in fact continue to work throughout their pregnancy. (ECF No. 60-5 ¶ 7). Pregnant employees who are unable to perform essential functions of their job are granted a leave of absence, but are ineligible for temporary work assignments or other light-duty work. (ECF No. 60-5 ¶ 7).

Young argues that UPS made exceptions to its stated policy of refusing to provide accommodations to employees who were injured off-duty. For instance, she believed one employee with cancer was given "light duty" while undergoing treatment. (ECF Nos. 76-4 ¶ 23; 76-11 ¶ 2). Young provides evidence of several other instances of accommodation for drivers and other employees dealing with injuries or other job impediments. (*See, e.g.*, ECF Nos. 76-4 ¶¶ 22-30; 76-5 ¶¶ 3-4; 76-6 ¶¶ 4-7; 76-8 ¶¶ 4-5; Pl.'s Ex. 32; 76-16 ¶¶ 33-36). Young also notes instances where other pregnant employees enjoyed accommodations. (*See, e.g.*, ECF Nos.

76-11 ¶¶ 5-7, 9; 76-16 ¶ 32).

Several of Young's cited "exceptions" involved drivers who failed a Department of Transportation ("DOT") medical exam. Drivers must pass such a medical exam every 24 months. *See* 49 C.F.R. § 391.45. Article 20, Section 4 of the CBA provides that, if a driver fails the exam and becomes legally prohibited from driving, but is still fit enough to perform "inside jobs,"[5] UPS must provide that employee with such a job. (ECF No. 76-27, at 7; *see also* Brien Dep., at 17-18, 93-94, 103-05, 114-15; *see, e.g.*, ECF No. 76-21, at 3). Similar arrangements are provided for under the CBA for drivers who lose their driver's license or have been involved in a motor vehicle accident. (ECF Nos. 85-3 ¶ 3; 76-27, at 4-5, 6, 17).

Carolyn Martin, the District Occupational Health Manager for the Metro D.C. District at UPS, was the individual charged with applying the above policies in Young's region. (ECF Nos. 60-5 ¶ 1; 60-4, at 11-15; 60-6, at 15-17; Brien Dep., at 107-08). In particular, Martin was responsible for:

> . . . most issues relating to employee health and ability to work, including leaves of absence under the Family and Medical Leave Act . . ., the administration of UPS's Program for Compliance with the [ADA], the [DOT] medical examination and qualification requirements applicable to UPS drivers, and injury prevention. [She] also was

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[5] "Inside jobs" are not light duty jobs. (ECF No. 60-4, at 52-56).

> the official in the Metro D.C. District who made decisions about whether employees were able to perform the essential functions of their jobs based on restrictions imposed by physicians.

(ECF No. 60-5 ¶ 1). In determining whether an employee could perform her job, Martin would rely on the Essential Job Functions list for each employee's job. (ECF No. 60-5 ¶ 6). Martin states that only she has the authority to grant accommodations. (ECF No. 60-5 ¶ 8; *see also* Brien Dep., at 57-60). According to her, she would only provide accommodations in accordance with company policy and would put an end to any accommodation inappropriately granted by a manager or supervisor. (ECF No. 60-5 ¶ 8). Martin states that she makes accommodation decisions on her own. (ECF Nos. 60-4, at 64-65).

3. Young's Pregnancy and Problems with UPS

In 2005, Young started a first round of *in vitro* fertilization in an effort to get pregnant. (Young Dep., at 118). Because of that treatment, Young took a leave of absence from her job at UPS beginning in July 2005. (Young Dep., at 121-22). Young became pregnant, but suffered a miscarriage in September. (Young Dep., at 122). She returned to her former position at UPS roughly a month later, in October 2005. (Young Dep., at 122).

In February 2006, Young started a second round of *in vitro* fertilization. (Young Dep., at 123).

She again requested time off, this time submitting a form titled, "Certification by Health Care Provider." (ECF No. 60-11, at 1). Young's physician certified on that form that she was unable to perform work on the day of surgery or the day after, and should not lift more than ten to fifteen pounds for two weeks after surgery. (ECF No. 60-11, at 1). Martin approved the leave request.[6] (ECF No. 60-11, at 2). Young then took leave beginning on February 21, 2006. (ECF No. 60-11, at 2).

The second round of *in vitro* fertilization was unsuccessful and Young returned to work in March 2006. (Young Dep., at 125). After her return, Carol Richardson – the other driver on Young's route – insisted on taking all of the heavier packages from Young. (Young Dep., at 76; ECF Nos. 76-16 ¶ 3; 76-9 ¶ 4). Richardson took the heavier packages because she was concerned Young might not be able to get pregnant again if she handled them herself. (Young Dep., at 77, 435-36; ECF Nos. 60-10, at 6-7; 76-9 ¶ 4; 76-4 ¶ 15).[7]

Young then began a third round of *in vitro*

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[6] Young had previously spoken with Martin about the proper procedure for requesting leave. (Young Dep., at 96-98; ECF No. 76-16 ¶ 8). She states that Martin told her she would need to "bring in a doctor's note with [her] restrictions when [she] returned to work." (ECF No. 76-16 ¶ 8; *see also* Young Dep., at 130 ("I believe Carol Martin said I had to bring in doctors' notes.")). Martin did not always require such a note from people returning from leave; for example, she did not require such a note from people who took "intermittent" medical leave. (ECF No. 76-20, at 15).

[7] Young suggests this was part of an "informal allocation" system. (ECF Nos. 76-11 ¶ 11; 76-15 ¶ 6).

fertilization in July 2006. (Young Dep., at 45). Once more, she asked for a leave of absence because she could not lift more than ten pounds. (Young Dep., at 45). In another letter from Martin, UPS granted her requested leave. (Young Dep., at 126). The leave began at the end of July, with an anticipated return date around August 26. (Young Dep., at 127; ECF No. 76-16 ¶ 12). The third round of *in vitro* was successful, and Young became pregnant. (Young Dep., at 23, 127).

Because of the new pregnancy, Young sought to extend her leave. (Young Dep., at 137, 153, 258-59; ECF No. 76-16 ¶¶ 12, 13, 15). Consequently, she went to the D.C. Building sometime in September 2006 and dropped off a "letter with [her restrictions]" from her doctor, Dr. Thaddeus Mamlenski. (Young Dep., at 128, 136-37; ECF No. 76-16 ¶ 14). The letter recommended that Young "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." (ECF No. 60-12, at 1). She left the note with her supervisor, Urusla Blunt, or "someone else at UPS to give to her." (ECF No. 76-16 ¶ 14). When she delivered the note, Young was told to speak with Martin about her leave extension request. (Young Dep., at 139).

Young later called and left a voicemail message for Martin informing her of the doctor's note. (Young Dep., at 143-44). Sometime thereafter, Young finally reached Martin, told her about the doctor's note, and told her she "wasn't ready to come back to work quite yet." (Young Dep., at 148-49). According to Young, Martin responded that she "wasn't sure what to do with [Young] at that point." (Young Dep., at 149). Martin also

"gave [Young] the impression that UPS did not care when [she] returned to work." (ECF No. 76-16 ¶ 15). Martin reminded Young, however, that when she did return she "needed to bring in a doctor's note stating what [her] restrictions were." (ECF No. 76-16 ¶ 15).

Young had another checkup appointment on October 11, 2006 with nurse midwife Cynthia Shawl. (Young Dep., at 156). Following an "encouraging appointment" (Young Dep., at 157), Shawl released Young "without limitations" (ECF No. 76-12 ¶ 2). Nonetheless, Shawl wrote a note stating: "Due to her pregnancy it is recommended that she not lift more than 20 pounds." (ECF Nos. 76-12 ¶ 3; 60-13, at 1). Shawl did not normally write such notes, but "wrote this note only because Ms. Young told me she needed a letter for work stating her restrictions." (ECF No. 76-12 ¶ 4). Her letter did not include the word "restriction" because she felt she "was making only a recommendation." (ECF No. 76-12 ¶ 4).

A short time thereafter, Young contacted Blunt and asked to come back to work. (Young Dep., at 186). She also explained, however, that she had a "doctor's" note with a recommendation not to lift more than 20 pounds, and asked if there was any light duty available. (Young Dep., at 186-87). Blunt referred her again to Martin. (Young Dep., at 188).

At some point before Young reached out to Martin, Martin learned about Young's doctor's note through another UPS manager, Jim Harris. (ECF No. 60-4, at 37-38). Harris phoned Martin and told her that "Peggy Young had brought in a note regarding light duty because she had restrictions

due to her pregnancy." (ECF No. 60-4, at 37-38). She told Harris that, "since [Young] ha[d] restrictions, that she [could] not be allowed to continue doing her regular job as a delivery driver or air driver or service provider." (ECF No. 60-4, at 38). She knew that the Essential Job Function list required air drivers to lift 70 pounds, and consequently "concluded that the lifting restriction rendered Peggy Young unable to perform the essential functions of her job." (ECF No. 60-5 ¶ 10). Martin also believed that Young was ineligible for light duty or an alternative work assignment because the restriction was not the result of an on-the-job injury. (ECF No. 60-5 ¶ 10). She told Harris that Young could not return to work while the restriction was in place. (ECF Nos. 60-5 ¶ 10; 60-4, at 38). She reached this decision entirely on her own. (ECF No. 60-5 ¶ 11).

At the end of October 2006, Young called and left a phone message with Martin. (Young Dep., at 162-63). Young explained that "she got a note with her restrictions and that, you know, [she] felt good about [her] pregnancy and that [she] wanted to come back to work and [she] needed to know what [she] had to do." (Young Dep., at 163). Martin returned her call the same day. (Young Dep., at 164). They again discussed the lifting recommendation and Young's health. (Young Dep., at 164). Martin then told Young that (a) UPS did not "offer light duty for pregnancy, only for on-the-job injuries"; (b) Young didn't "qualify for short-term disability because [her] doctor didn't give [her] a note saying that [she] couldn't work, that [she] just had a lifting restriction"; and (c) that she had used up all of her medical leave. (Young

Dep., at 164-65; ECF No. 60-5 ¶ 11). Martin also informed Young: "Based on company policy, I, unfortunately, could not allow her to continue working with her 20-pound lifting restriction." (ECF No. 60-4, at 41). Young told her she "wanted to work" and Martin felt that, although she "would have loved to help her" (ECF No. 60-4, at 44), she "needed to treat [Young] like [she] would treat anybody who had a note for lifting and couldn't do their regular job." (ECF No. 60-4, at 42).

Martin explains that she would have allowed Young to return to work if Young had "presented another medical certification indicating that the lifting restriction had been removed and that she was able to perform the essential functions of her job." (ECF No. 60-5, at 7). Young, however, says Martin provided her with only two options: provide a note stating that she could not work at all – rendering her eligible for disability – or "think about [her] job with UPS because [she] was pregnant and had used up [her medical] leave." (Young Dep., at 317, 559-60; ECF No. 30-3 ¶¶ 20-21).

In early November 2006, Young spoke with "the top person at [her] jobsite," Myron Williams, about the possibility of returning to work. (ECF No. 76-16 ¶ 26). Williams, who is the Capital Division Manager,[8] "did not have the authority to determine whether [an] employee was able to

[8] Contrary to Young's characterization, the record reflects that Williams led a small division encompassing one building, not the entire Metro D.C. District. (Brien Dep., at 65, 240-41; ECF Nos. 85-4 ¶¶ 2-3; 85-5 ¶¶ 4-5).

perform the essential functions of his/her job notwithstanding [a] restriction/recommendation." (ECF No. 85-4 ¶ 5; *see also* ECF No. 85-5 ¶¶ 5-6).[9] Young maintains that Williams told her "not to come back in the building until [she] was no longer pregnant because [she] was too much of a liability." (ECF No. 76-16 ¶ 26; *see also* Young Dep., at 563-64). Williams denies making any such statement. (ECF No. 85-4 ¶ 4).

By this point in time, Young had exhausted her medical leave, but her leave of absence was extended. (ECF No. 60-5 ¶ 12). UPS "coded" Young's absence under the code for "disability" on her attendance chart. (ECF Nos. 76-26, at 4; 76-16 ¶¶ 45; Young Dep., at 166-170).[10] During her leave, Young received no pay and lost her medical coverage at the end of 2006. (ECF No. 76-16 ¶ 38; ECF No. 76-26, at 1).

Young gave birth to her child on April 29, 2007. (Young Dep., at 204). She did not immediately return to UPS because she "felt as though [she] should have the maternity leave like every other pregnant woman to spend time with their child and bond with their child before they

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[9] Young cites the testimony of another UPS employee as evidence that Williams *did* have the authority to make leave determinations. (ECF No. 76-4 ¶ 11). The employee states that "nobody would have stopped" a manager from placing an employee on light duty, as "[t]hat is just how it works." (ECF No. 76-4 ¶ 11).

[10] Martin states, however, that she did not believe Young had a disability within the meaning of the ADA. (ECF NO. 60-5 ¶¶ 14-16). If she had, she "would have discussed the ADA procedure . . . and suggested that [Young] apply for an accommodation under the ADA policy." (ECF NO. 60-5 ¶ 15).

have to return to work." (Young Dep., at 227). She also felt that she would not have been able physically or emotionally to perform her regular job for the first two months after the birth. (Young Dep., at 606-607). As soon as Young wished to return to work, she did so. (Young Dep., at 210-11). She returned to work on June 26, 2007 and resumed the same position she held before. (Young Dep., at 208, 211).

B. Procedural Background

On July 23, 2007, Young filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination based on race, sex, and pregnancy. The EEOC issued Young a right to sue letter on September 2, 2008. Young filed this action on October 3, 2008 against the United Parcel Service of America, Inc., United Parcel Service, Inc., UPS Health Program, Aetna Life Insurance, and Aetna Disability and Absence Management. That complaint alleged violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et. seq.*, and 42 U.S.C. § 1981. 1964, 42 U.S.C. §§ 2000e *et. seq.*, and 42 U.S.C. § 1981. (ECF No. 1).

On October 29, 2008, Young filed an amended complaint against only United Parcel Service of America, Inc. and United Parcel Service, Inc.; the amended complaint dropped the ERISA claim, and seeks damages and equitable relief for alleged violations of Title VII, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"),

and Section 1981. (ECF No. 4). Defendants filed an answer on December 8, 2008 (ECF No. 7), and a scheduling order was entered the same day. (ECF No. 8). That scheduling order required that all motions to amend be submitted by January 22, 2009. (ECF No. 8, at 2). By stipulation of the parties, Defendant UPS of America, Inc. was dismissed from the case on December 17, 2008. (ECF No. 14).

UPS filed a motion for summary judgment on July 30, 2010. (ECF No. 60). Young responded in opposition on September 16, 2010. (ECF No. 76).[11] In addition, Young filed a motion to compel certain discovery concerning comparator evidence and "delivery weight" evidence. (ECF No. 78). In conjunction with the motion to compel, Young moved for a continuance pursuant to (former) Federal Rule of Civil Procedure 56(f)[12] in the event that the court finds such evidence materially lacking in determining the summary judgment motion. (ECF No. 80). On August 31, 2010, Young moved to dismiss her racial discrimination claim. (ECF No. 69).

II. Motion for Voluntary Dismissal

Young has moved to dismiss her racial discrimination claim voluntarily pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. (ECF No. 69). Young concedes that the information

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[11] Two motions to seal were also filed in connection with the summary judgment briefing. (ECF Nos. 77, 93).

[12] Following a recent amendment, the relevant rule has been moved to Rule 56(d) of the Federal Rules of Civil Procedure.

revea[illegible]d during discovery "does not disclose a patte[illegible] of discrimination that would support a race discrimination claim in this case." (*Id.* at 5). UPS argues that the dismissal should be with prejudice.

Although both parties treat this as an issue falling under Rule 41(a)(2), the relevant rule is Rule 15. Rule 41(a), which addresses voluntary dismissals, applies only when a party seeks to dismiss an entire action, not merely one claim or count. *Iraheta v. United of Omaha Life Ins. Co.*, 353 F.Supp.2d 592, 595 (D.Md. 2005); *see also* Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 2362 (3d ed. 2008). "This conclusion is based on the fact that both Rules 41(a)(1) and (a)(2) only apply their terms to dismissal of an 'action,' while Rule 41(b) provides that 'a defendant may move to dismiss the action or any claim against it.'" *In re Amp'd Mobile, Inc.*, 395 B.R. 582, 585 (Bankr.D.Del. 2008). Consequently, a plaintiff wishing to dismiss one count of a multi-count suit should ordinarily look to Rule 15, which governs amendments to pleadings.

Because Young in effect seeks to amend her pleading almost two years after the pleadings deadline set forth in the scheduling order, the matter may not be resolved by simply applying Rule 15. Instead, Rule 16(b) also applies · and the standards for satisfying Rules 15 and 16 are sometimes at odds. Rule 15(a)(2) states in pertinent part that leave shall be freely given "when justice so requires," while Rule 16(b)(4) states that "[a] schedule may be modified only for good cause and with the judge's consent." The Fourth Circuit resolved this tension in *Nourison Rug Corp.*

v. Parvisian, 535 F.3d 295, 298 (4th Cir. 2008), when it conclusively held that "the good cause standard must be satisfied to justify leave to amend the pleadings" after scheduling order deadlines have passed.

Rule 16(b)'s "good cause" standard was analyzed in a previous opinion in this case, *Young v. UPS*, No. DKC 08-2586, 2010 WL 1346423, at *5-6 (D.Md. Mar. 30, 2010), so only the briefest review is necessary here. Rule 16(b) "focuses on the timeliness of the amendment and the reasons for its tardy submission." *Rassoull v. Maximus, Inc.*, 209 F.R.D. 372, 374 (D.Md. 2002). The primary consideration for Rule 16(b)'s "good cause" standard is the movant's diligence. Lack of diligence and carelessness are the "hallmarks of failure to meet the good cause standard." *W. Va. Hous. Dev. Fund v. Ocwen Tech. Xchange, Inc.*, 200 F.R.D. 564, 567 (S.D.W.Va. 2001). "If [the movant] was not diligent, the inquiry should end." *Marcum v. Zimmer*, 163 F.R.D. 250, 254 (S.D.W.Va. 1995).

A plaintiff's request to amend may be denied for unreasonable delay when the plaintiff previously failed to correct a pleading problem though given the opportunity to do so. In addition, a plaintiff's request to amend a complaint may be unreasonable and prejudicial if it is brought only after defendant has moved for summary judgment, particularly if it appears to be an effort to avoid the preclusive effect of summary judgment. *See, e.g., Kleinhans v. Lincoln Sav. Profit Sharing Trust*, 810 F.2d 618, 625 (7th Cir. 1987) (affirming denial of motion to amend where motion represented "an apparent attempt to avoid the effect of summary judgment"); *see*

also Burton v. Youth Servs. Int'l, Inc., 176 F.R.D. 517, 521 (D.Md. 1997). Such is the case here. The parties have engaged in substantial discovery and briefed multiple motions. A motion for summary judgment is fully briefed and pending. And now, in the midst of that major dispositive motion, Young seeks to dismiss her race discrimination claim without prejudice before a final determination can be made.[13]

Under the circumstances, the motion to dismiss will be denied and the claim will be addressed on the merits. Young initially dropped the race discrimination claim from a proposed amended complaint filed in June 2009 (ECF No. 30), but left the claim intact after the court denied her attempt to add certain other claims (ECF No. 44). Because Young apparently understood that the claim should have been dropped more than a year before filing this motion to "dismiss," it is hard to see how she could argue that she had good cause for her delay. Young's motion to dismiss, construed as a motion to amend, will be denied.

In addition, UPS also argues in its response to Young's motion for voluntary dismissal that it is due attorneys' fees if the race discrimination claim is dismissed. UPS contends that Young has pursued – at least until now - what she knew to be a "completely meritless" claim. (ECF No. 81, at 1). A "district court has authority to shift attorneys fees, but . . . only in the extraordinary circumstances where bad faith or abuse can form a basis for

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[13] Plaintiff acknowledges that a dismissal at this time would effectively be with prejudice because the statute of limitations has run. (ECF No. 84).

doing so." *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 543 (4th Cir. 2002). UPS has not yet proven the requisite degree of bad faith or unreasonableness. *Miller v. Downes*, 935 F.2d 660, 664 (4th Cir. 1991) ("[C]ounsel do not have to be right on their legal position to avoid sanctions, only reasonable."). Consequently, UPS's request for attorneys' fees will be denied.

III. Motion for Summary Judgment

A. Standard of Review

UPS has moved for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. A court may enter summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). Summary judgment is inappropriate if any material factual issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001).

"A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed.R.Civ.P. 56(e)). "A

mere scintilla of proof . . . will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50. (citations omitted). At the same time, the court must construe the facts that are presented in the light most favorable to the party opposing the motion. *See Scott v. Harris*, 550 U.S. 372, 378 (2007); *Emmett*, 532 F.3d at 297.

B. Analysis

Young's complaint alleges three forms of employment discrimination: gender-based discrimination, race-based discrimination, and disability-based discrimination. In the end, none of these three claims succeeds.

1. Gender-Based Discrimination[14]

The Pregnancy Discrimination Act ("PDA"), which amends Title VII, states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability

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[14] In her opposition to summary judgment, Young again raises two claims that were considered and rejected in an earlier opinion. *See Young v. United Parcel Serv. of Am., Inc.*, No. DKC-08-2586, 2010 WL 1346423, at *6-7 (D.Md. Mar. 30, 2010). Because Young raises the issues "as offers of proof to preserve [them] for appeal" (ECF No. 76-1, at 50), there is no need to discuss them again in this opinion.

or inability to work." 42 U.S.C. § 2000e(k). Under the PDA, a pregnancy discrimination claim is "analyzed in the same manner as any other sex discrimination claim brought pursuant to Title VII." *Jordan v. Radiology Imaging Assocs.*, 577 F.Supp.2d 771, 779 (D.Md. 2008) (quoting *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 297 (4th Cir. 1998)). As such, Young may avoid summary judgment via the two alternative avenues of proof available to all discrimination plaintiffs. First, she may show "through direct or circumstantial evidence" that her pregnancy "motivated the employer's adverse employment decision." *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). Alternatively, she may "proceed under a 'pretext' framework" – commonly referred to as the *McDonnell Douglas* approach – "under which the employee, after establishing a *prima facie* case of discrimination, demonstrates that the employer's proffered permissible reason for taking an adverse employment action is actually pretext for discrimination." *Hill*, 354 F.3d at 285.

Young attempts to prove her case via both methods of proof.

a. Direct Evidence

Young first attempts to establish her case using three items of purported "direct evidence." Direct evidence is "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 520

(4th Cir. 2006) (quotation marks omitted). If believed, direct evidence "would prove the existence of a fact . . . without any inference or presumptions." *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) (quotation marks omitted), *rev'd on other grounds by* 517 U.S. 308 (1996). To defeat a motion for summary judgment, the evidence must show that the employer announced, admitted, or "otherwise unmistakably indicated" that an impermissible consideration was a determining factor, or that discrimination can properly be assumed from the circumstances. *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 485 (4th Cir. 1982).

Young contends that one piece of direct evidence is Williams' alleged statement that she was "too much of a liability" to remain at work. She is right that "[d]erogatory remarks may in some instances constitute direct evidence of discrimination." *Eruanga v. Grafton Sch., Inc.*, 181 F.Supp.2d 514, 521 (D.Md. 2002) (quoting *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999)). But "the derogatory remark cannot be stray or isolated." *Id.* "[A]nd unless the remarks upon which [the] plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination." *Id.* (quotation marks omitted).

A simple comment that an employee is a "liability" could very well be insufficient to tie discrimination to the adverse action. *See, e.g., Allen v. Commercial Pest Control, Inc.*, 78 F.Supp.2d 1371, 1375 (M.D.Ga. 1999) (finding employer's comment that employee was a liability to the company was not direct evidence of

discrimination). Yet even if one assumes a sufficient causal link in such a statement, Young must produce sufficient evidence to establish that Williams "was the one principally responsible for, or the actual decisionmaker maker behind, the [adverse] action." *Hill*, 354 F.3d at 288-89. Williams was not the decisionmaker here, Martin was.[15] It is not enough that Williams was "in communications with [Martin] regarding employees and their work limitations." (ECF No. 76-1, at 32). Although Williams was a manager, the evidence indicates that his responsibilities were limited to a single building. There is no suggestion that he "outranked" Martin or had any power to make decisions about employee leave or accommodations. Whenever an issue arose concerning leave or accommodations, Young was directed to speak with Martin. And although another employee speculated that managers were involved in granting light duty, there can be no genuine dispute that Martin was the relevant decisionmaker in Young's case and in most every other case. Even if Williams had some minor influence on the decision to refuse Young light duty, that is not enough. "[A]n employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality

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[15] Young argues that Martin was not really a decisionmaker either, as she was merely implementing a pre-existing discriminatory policy at UPS. "A decisionmaker is the person responsible for the contested decision." *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir. 2003) (quotation marks omitted). Because Martin decided that Young would not be allowed to return to work and would not be granted accommodations, she was the decisionmaker.

makes the decision." *Hill*, 354 F.3d at 291.

Young also asserts that Williams's statement placed Martin's decisions in a "less neutral context." *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 301 (4th Cir. 2010). In *Merritt*, the Fourth Circuit agreed that the decisions of non-decisionmakers colored the choices of the decisionmaker. *Id.* But the Fourth Circuit did so only after finding that the defendant's "corporate culture evinced a very specific yet pervasive aversion" to female drivers, which was evidenced by multiple statements from "employees[] of all ranks." *Id.* at 300-301. Williams's remark in this case largely stands by itself; there is no evidence indicating a corporate culture permeated with discrimination at UPS.

Young suggests a second piece of direct evidence is the fact that UPS required Young to provide a doctor's note stating her restrictions – and later suggested that she get a doctor's note indicating she could not work at all. The requests for doctor's notes are not direct evidence, as a number of inferences would be required to conclude that they reflect discrimination. One would have to infer, for instance, that the doctor's notes were the first step in a plan by UPS to exclude Young from work. One would have to infer that Young was asked to provide a note because she was pregnant, even though the evidence indicates that many employees – pregnant and non-pregnant alike – were asked to submit notes. One would have to infer that Martin and UPS were acting in bad faith when they read the note's lifting recommendations narrowly and did not pursue further follow-up with Young's medical providers. The note requests are

too distant from discrimination to constitute direct evidence. *See, e.g.*, *Elam v. Regions Fin. Corp.*, 606 F.Supp.2d 999, 1010 (S.D.Iowa 2009).

Citing *Merritt* once more, Young nonetheless insists that the requests for notes showed UPS's "assumption that a pregnant woman should have restrictions." It is true that the Fourth Circuit concluded that a company's use of a physical ability test for women (but not men) "could be seen by a jury to embrace beliefs that women are unsuited for some of the more remunerative forms of manual labor and, once injured, are less resilient in their ability to recover." 601 F.3d at 300. In contrast to *Merritt*, however, there is no evidence in this case that doctor's notes "with restrictions" were only requested from pregnant women. Although Martin admitted she did not ask for notes from those returning from short, intermittent leave, there is no indication that doctor's notes were otherwise selectively used or used in a manner distinguishing between pregnant and non-pregnant employees.

Finally, Young argues that UPS has a "no-light-duty for pregnancy" policy. (ECF No. 76-1, at 35). *See* 29 C.F.R. 1604.10(a) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII."). Certainly, liability will attach in a disparate treatment case when the employer "relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with [a protected] trait." *Hazen Paper Co. v. Biggins*,

507 U.S. 604, 610 (1993).[16] But any suggestion that UPS had such a policy is belied by the record. Young appears to be misstating UPS's actual policy of accommodating only drivers (1) who suffered on-the-job injuries; (2) who were disabled under the Americans with Disabilities Act; or (3) lost their DOT certification to drive. As Martin herself explained, "UPS does not offer light duty to any employee, male or female, who has any medical condition not related to work, pregnancy included." (ECF No. 60-4, at 51). Because UPS determines whether accommodations will be offered on these gender-neutral criteria, it at least on its face a "neutral and legitimate business practice." *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 297 (4th Cir. 2010). What the Sixth Circuit said in an analogous case applies with equal force here:

> [The employer's] light-duty policy is indisputably pregnancy-blind. It simply does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions. It makes this determination on the nonpregnancy-related basis of whether there has been a work-related injury or condition. Pregnancy- blind policies of course can be tools of discrimination. But challenging them as tools of discrimination requires evidence and inference beyond such policies' express

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[16] Although *Hazen* is case concerning the Age Discrimination in Employment Act ("ADEA"), the principle applies in this context as well.

terms.

> [The] pregnancy-blind policy, therefore, cannot serve as direct evidence of . . . alleged discrimination.

Reeves v. Swift Transp. Co., Inc., 446 F.3d 637, 641 (6th Cir. 2006).

In sum, Young has not presented any direct evidence of gender-based discrimination.

b. The *McDonnell Douglas* Framework

Lacking direct evidence, Young needs to proceed using the burden-shifting framework found in *McDonnell Douglas*. Under this approach, Young first must establish a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. UPS is then required to offer a non-discriminatory justification for the adverse employment action. *Id.* If it does so, the burden shifts back to Young to demonstrate that UPS's justification is pretextual. *Id.* at 803-05.

At this point, an employee's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000). On the other hand, "there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the

action was discriminatory." *Id.*[17] UPS would still be entitled to summary judgment, for example, if Young is able to create only "a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

1) **Prima Facie Case**

To make a prima facie case, Young must show that (1) she is a member of a protected class; (2) she was qualified for the job and performed it satisfactorily; (3) she suffered an adverse employment action; and (4) she was treated differently than similarly situated employees outside of the protected class. *Popo v. Giant Foods LLC*, 675 F.Supp.2d 583, 589 (D.Md. 2009); *see also Taylor v. Virginia Union Univ.*, 193 F.3d 219, 233 (4th Cir. 1999). UPS has conceded on this motion that Young has satisfied the first and third elements of her prima facie because she was pregnant and denied light duty. (ECF No. 60-1, at 24); *see also Miles v. Dell, Inc.*, 429 F.3d 480, 490 (4th Cir. 2005) ("[F]or purposes of establishing a prima facie case of pregnancy discrimination, the protected class is pregnant women, not all women."). Thus, only the second and fourth elements are really at issue.

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[17] In a similar vein, "courts must resist the temptation to become so entwined in the intricacies of the *McDonnell Douglas* proof scheme that they forget that the scheme exists solely to facilitate determination of the ultimate question of discrimination *vel non*." *Merritt*, 601 F.3d at 295 (quotation marks, brackets, and ellipses omitted).

UPS argues that Young has not established the fourth element of the prima facie case because she has not presented a "comparator," *i.e.*, a similarly situated employee who was treated differently.[18] Time and again, Young argues that that UPS accommodates employees "affected by such things as high blood pressure, diabetes, vision problems, and drunk driving convictions," while it denies accommodations for pregnant women. (ECF No. 76-1, at 42). She suggests all of these individuals were similar to her in their inability to work and represent valid comparators.

UPS correctly notes that each of Young's examples is an employee who was accommodated (a) under the ADA or (b) under the provisions of the CBA governing drivers who lose their DOT certification for various reasons. (ECF No. 85, at 21-24). It concludes that Young's examples are not appropriate comparators because Young was ineligible for ADA accommodation and did not lose her DOT certification. Young responds that drivers losing their DOT certification *are* valid comparators. (*See* ECF No. 76-1, at 45 ("When UPS gives an alternative job to the driver who fails to meet the DOT requirement and send home the driver who, because of pregnancy, fails to meet the lifting requirement, UPS violates the PDA.")).

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[18] Young is not required to point to a similarly situated comparator as a matter of law; she could succeed on her claim if other circumstantial evidence suggests discrimination. *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 545 (4th Cir. 2003). She has not presented such circumstantial evidence here.

"The similarity between comparators . . . must be clearly established in order to be meaningful." *Lightner v. City of Wilmington, NC*, 545 F.3d 260, 265 (4th Cir. 2008). In the pregnancy discrimination context, a plaintiff needs to show that her proposed comparators are "similar in their ability or inability to work" to the plaintiff. 42 U.S.C. § 2000e(k). There has been no clear showing here. As the court has already indicated on more than one occasion, drivers who lose their DOT certification are not similar in their inability to work to Young. (*See, e.g.*, ECF No. 43, at 18 ("[I]nformation regarding employees assigned to 'inside jobs' because they lost their certification from the [DOT] and were unable to drive [is] irrelevant."), 21-22 ("Plaintiff is prohibited from asking about matters that are not related to claims in her amended complaint, such as . . . UPS's assignment of alternative work to employees who lost their driver's licenses or failed the DOT exam.")). Such drivers suffer from a legal obstacle to their operation of a vehicle; Young possessed a physical impairment that stymied her ability to lift. Those inabilities are dissimilar. *See, e.g.*, *Walker v. Fred Nesbit Distrib. Co.*, 156 F.App'x 880, 884 (8th Cir. 2005) ("[A pregnant driver's] inability to work stemmed from her inability to meet the fifty-pound lifting requirement of her job, not the loss of her CDL. Given the difference between a male driver who . . . [lost] his license and a female driver given eighteen months of unpaid leave due to an inability to meet the lifting requirement, we hold the district court did not abuse its discretion in concluding that a reasonable jury could have found that [the pregnant driver] was not

similarly situated to male drivers . . . [who lost] their CDLs."). Moreover, those with DOT certification maintained the ability to perform any number of demanding physical tasks, while Young labored under an apparent inability to perform tasks involving lifting.

Young complains that by excluding drivers who lost their DOT certification, UPS is effectively "find[ing] a (selective) group that it arguably treated as badly as it treated pregnant employees." (ECF No. 76-1, at 42). She argues that "[t]he PDA does not codify a lowest common denominator, a least-favored nation rule." (*Id.*). The law is different, however. "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *accord Daugherty v. Genesis Health Ventures of Salisbury, Inc.*, 316 F.Supp.2d 262, 265 (D.Md. 2004) (Davis, J.) ("[T]he rule seems to be that disability arising from pregnancy cannot be singled out for less favorable treatment."). It is important here to recall the objective of this element of the *prima facie* case: to discern whether a reasonable inference can be drawn that the employer has animus directed *specifically* at pregnant women. When an employer grants pregnant employees and some class of non-pregnant employees equally harsh terms, it undermines such an inference. In such circumstances, an employer might have some form of animus that is not to be applauded, but the animus is not directed towards a protected trait and, consequently, is not actionable.

Lacking any similarly situated comparator – or

any other circumstantial evidence – Young's disparate treatment claim fails.

2) Pretext

Even if Young had presented a prima facie case, she has not shown that UPS's non-discriminatory explanation was pretextual. The record reflects that Martin earnestly believed that Young's doctor's note rendered her unable to perform her job. She then applied the standard policy applicable to off-duty injuries not otherwise dealt with in the CBA.

Young lists a number of factual points that she says show that UPS is "illogical, inconsistent, and dishonest." Her evidence, however, does not support such a harsh characterization. She argues, for instance, that UPS obviously contrived the lifting requirement because heavy lifting is not truly necessary for all UPS drivers. But Martin relied on a written job description containing the lifting requirement, and there is nothing in the record to indicate that she applied that job description despite knowledge that heavy lifting was not a genuine requirement in an effort to target pregnant women. Thus, at best, all Young has shown is that Martin erroneously relied on an inaccurate job description in barring Young from her job. *See Price v. Thompson*, 380 F.3d 209, 215 n.1 (4th Cir. 2004) ("[M]ere mistakes of fact are not evidence of unlawful discrimination."); *see also Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) ("[I]t is not [the court]'s province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the

plaintiff's [adverse action]." (quotation marks omitted)).

Young quibbles with certain other factual statements made by UPS. These extraneous points do not even require discussion. "Once an employer has provided a non-discriminatory explanation for its decision, the plaintiff cannot seek to expose that rationale as pretextual by focusing on minor discrepancies that do not cast doubt on the explanation's validity, or by raising points that are wholly irrelevant to it. The former would not create a 'genuine' dispute, the latter would fail to be 'material.'" *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 216 (4th Cir. 2007).[19] There is no evidence of pretext.

2. Race-Based Discrimination

UPS moved for summary judgment on the race discrimination claim, arguing that Young has not established that she was treated less favorably than those outside her protected class. (ECF No. 60-1, at 44). Again, to establish a *prima facie* case of discrimination, Young would need to

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[19] Young also says that UPS's explanation must be pretextual because "is counter to its own explanations of business interests in personnel matters." Even if Young is correct, other opposing business interests are served by UPS's policy. Many if not most business decisions involve a balancing of such interests – and it is inappropriate to declare an explanation for an adverse action "pretextual" merely because an employer chose to sacrifice certain business interests for the sake of other interests. "Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette*, 133 F.3d at 298-99 (quotation marks omitted).

show that (1) she is a member of a protected class;[20] (2) she suffered an adverse employment action; (3) she was performing satisfactorily at the time of the adverse employment action; and (4) there were circumstances or different treatment giving rise to an inference of discrimination. *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). UPS's argument goes to the fourth element of the *prima facie* case.

Judging from the amended complaint, Young intended to establish the fourth element by relying – at least in part - on a pattern or practice of racial discrimination at UPS. (*See, e.g.*, ECF No. ¶¶ 29 ("UPS maintains a pattern of discrimination in employment on the basis of sex and race."); 39 ("UPS maintains a pattern of discrimination on the basis of race."); *see also* ECF No. 69, at 3 (stating Young wished to "determine the presence or absence of a pattern of racially discriminatory allowance and disallowance of accommodations for pregnant employees")). As the United States Court of Appeals for the Fourth Circuit has recognized, "[e]vidence of a pattern or practice of discrimination may very well be useful and relevant to prove the fourth element of a *prima facie* case . . . or that the employer's articulated reasons for the adverse action was merely pretext." *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527

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[20] Although Young is white, "[i]t is established that 'reverse racism' (race-based discrimination that targets white employees), as alleged here, is actionable under Title VII." *Reed v. Airtran Airways*, 531 F.Supp.2d 660, 668 n.11 (D.Md. 2008).

U.S. 1031 (1999).

Unfortunately for Young, she has failed to muster any such evidence in this case, as she herself now admits. (ECF No. 69, at 4). In fact, the record is devoid of *any* circumstances giving rise to an inference of race-based discrimination, short of one fleeting instance where an African-American employee was purportedly provided light duty during pregnancy. Based on an examination of the entire summary judgment record, one instance of disparate treatment, standing alone, does not a discrimination claim make. *See Cook v. CSX Transp. Corp.*, 988 F.2d 507, 512 (4th Cir. 1993). In *Cook*, the Fourth Circuit explained:

> We believe, however, that to focus on one piece of the record without considering the whole would distort the permissible inferences to be drawn. The scheme of proof originally articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adapted in *Moore* to cases of employee discipline, for establishing a prima facie case by circumstantial evidence is not a precise, mechanically-imposed formulation. In each set of circumstances, the burden is on the plaintiff to prove a set of circumstantial facts, which in the absence of a legitimate non-discriminatory explanation, leads one to conclude with reasonable probability that the action

> taken against him was the product of discrimination. *See Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1418 (4th Cir.), cert. denied, 502 U.S. 963, 112 S.Ct. 429, 116 L.Ed.2d 449 (1991). The question confronting a judge faced with determining whether a prima facie case under Title VII has been made is whether the record as a whole gives rise to a reasonable inference of racially discriminatory conduct by the employer. A plaintiff seeking to establish a prima facie case by relying on a broad history of disciplinary enforcement cannot fairly claim that an inference of racial discrimination should be drawn from one factual circumstance taken out of the context of the disciplinary treatment generally afforded by the employer for conduct similar to that of the plaintiff. We find that the district court was correct to look to the entire record before it in making its decision, rather than seizing upon a particular piece of evidence contained within it.

Accordingly, summary judgment will be entered for UPS on Young's race discrimination claim.

3. Disability-Based Discrimination

The ADA prohibits discrimination against "a qualified individual on the basis of disability."

42 U.S.C. 12112(a). Young asserts two claims under the Act. Both fall short.

a. **Medical Inquiry**

First, Young advances a "very simple" claim that UPS violated the ADA by "selectively" requiring her to submit a doctor's note. (ECF No. 76-1, at 53). One problem with this simple claim is that it is nowhere to be found in Young's amended complaint. Even if this claim was validly pled, it would not succeed because UPS was permitted to ask for such a note in these circumstances.

"The ADA limits the scope of information that employers may seek and disclose about their employees' medical conditions." *Wiggins v. DaVita Tidewater, LLC*, 451 F.Supp.2d 789, 801 (E.D.Va. 2006). Among other things, the ADA prohibits an employer from making inquiries of an employee as to whether he is an "individual with a disability or as to the nature or severity of the disability unless such . . . inquiry is shown to be job-related and consistent with business necessity."[21] 42 U.S.C. § 12112(d)(4)(A); *see also* 42 U.S.C. § 12112(d)(4)(B) ("A covered entity may make inquiries into the ability of an employee to perform job-related functions.").[22] EEOC regulations

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[21] Determining whether an inquiry or examination is "job-related and consistent with business necessity" is an objective inquiry. *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 518 (3d Cir. 2001).

[22] Young cites 42 U.S.C. § 12112(d)(3) for the proposition that a medical examination can only be required of a particular employee "where it is required of all such employees." (ECF

provide that that "[t]his provision permits employers to make inquiries or require medical examinations (fitness for duty exams) where there is a need to determine whether an employee is still able to perform the essential functions of his or her job." 29 C.F.R. pt. 1630, App'x § 1630.14(c), *cited with approval in Porter v. U.S. Alumoweld Co., Inc.*, 125 F.3d 243, 246 (4th Cir. 1997). At least some courts have held that the provision applies to all employees, "regardless of whether the employee has an actual disability." *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007).

Assuming that UPS's request for a doctor's note was an "inquiry" under Section 12112(d)(4)(A), it was "job-related and consistent with business necessity." Young delivered letters and packages. It is undisputed that customers had the ability to send heavier packages and that Young would be required to deliver them. The evidence indicates that Young did in fact deliver such packages on prior occasions.[23] *See Porter*, 125 F.3d at 246 ("[T]he facts that [the employee]'s job required lifting and pulling, . . . indicate that the requested fitness for duty exam was indeed job-related and necessary to determine if he could carry out his duties."). When she took a leave of absence for her *in vitro* fertilization treatments, she did so because she was no longer able to lift. She had previously

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No. 76-1, at 52). That provision applies only to employment entrance examinations.

[23] Indeed, the fact that Young requested light duty in the first place could be seen as a tacit acknowledgment that her job involved lifting heavier items.

taken several such leaves of absence. As the United States Court of Appeals for the Second Circuit has explained:

> [C]ourts will readily find a business necessity if an employer can demonstrate that a medical . . . inquiry is necessary to determine . . . whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work).

Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 98 (2d Cir. 2003). Because UPS possessed objective facts suggesting Young might have lost the ability to perform central job functions, it had a legitimate reason to seek some verification that Young had recovered her ability to perform those duties. *See, e.g.*, *Porter*, 125 F.3d at 247 (holding employer's medical inquiry was job-related and consistent with business necessity when employee returned to job involving lifting after back surgery); *accord Thomas*, 483 F.3d at 527 (holding employer had a legitimate reason to evaluate employee's fitness for duty where employee had previously exhibited signs of work-place stress).

b. Failure to Accommodate

Young also contends that Young wrongfully

failed to offer her an accommodation, even though it regarded her as disabled. UPS maintains that it did not regard Young's temporary lifting limitation as a disability under the ADA. Even if it had, UPS suggests that it has no duty to accommodate employees who are "regarded as" disabled but are not disabled in fact.

To establish a prima facie case for failure to accommodate, Young must show: "(1) that [s]he was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of [her] disability; (3) that with reasonable accommodation [s]he could perform the essential functions of the position . . . ; and (4) that the [employer] refused to make such accommodations." *Rhoads v. FDIC*, 257 F.3d 373, 387 n.11 (4th Cir. 2001); *see also EEOC v. Rite Aid Corp.*, --- F.Supp.2d ---, No. CCB-08-2576, 2010 WL 459842, at *5 (D.Md. Nov. 10, 2010). The parties' arguments here primarily concern the first element – whether Young in fact had a disability. The ADA defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Young relies on subsection (C), which covers circumstances when the employer "mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999), *superseded on other grounds by* ADA Amendments Act of 2008, Pub.L. 110-325, 122 Stat. 3553 (2008). Put differently, this "regarded as" coverage arises when the

employer "believe[s] . . . that [an individual] has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.* There is some emphasis on substantial in this analysis; an employer's mistaken belief that an employee is mildly impaired is not enough. Rather:

> [a]n employer regards a person as substantially limited in her ability to work if the employer perceived her to be significantly restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes. One must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs.

Rohan v. Networks Presentations LLC, 375 F.3d 266, 277 (4th Cir. 2004) (quotation marks, citations, and brackets omitted).

A person is not substantially limited in a major life activity merely because she is (a) limited to lifting a few pounds or (b) pregnant. *See Stewart v. West*, 228 F.Supp.2d 660, 662-63 (D.Md. 2002) ("[A] person is not substantially limited in a major life activity because she is limited to lifting ten to fifteen pounds."); *Wenzlaff v. NationsBank*, 940 F.Supp. 889, 890 (D.Md. 1996) ("With near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA."); *see also Williams v. Channel Master Satellite Sys.*,

Inc., 101 F.3d 346, 349 (4th Cir. 1996) ("[W]e hold, as a matter of law, that a twenty-five pound lifting limitation – particularly when compared to an average person's abilities – does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."). Nor would a temporary impairment typically constitute a disability. *See Pollard v. High's of Baltimore*, 281 F.3d 462, 468 (4th Cir. 2002) ("[T]emporary impairments usually do not fall within the ADA's definition of 'disability.'"). Consequently, Young would need to show that UPS regarded her as having more than a temporary lifting restriction and pregnancy. "Unless UPS mistakenly believed [Young] was substantially limited in a major life activity, it was free to decide that [her] lifting restrictions (real or perceived) prevented [her] from returning to [her] job as a . . . driver." *Jones v. UPS, Inc.*, 502 F.3d. 1176, 1191 (10th Cir. 2007).

The evidence Young presents probably does not indicate that UPS believed her to be anything other than a pregnant individual with a temporary lifting restriction. For instance, the most persuasive evidence is UPS's decision to "code" her as disabled. But, as UPS observes, there is little to indicate that any relevant decisionmaker was involved in assigning Young that code. "[W]hen an employee asserts . . . that he was regarded as disabled, the analysis focuses on the reactions and perceptions of the [employer's] decisionmakers who worked with the employee." *Wilson v. Phoenix Specialty Mfg. Co., Inc.*, 513 F.3d 378, 385 (4th Cir. 2008) (quotation marks omitted). Martin specifically disclaims any belief that Young was disabled.

Ultimately, it is not necessary to reach any definite conclusion on the factual question, because an employer is under no obligation to accommodate an employee who is simply regarded as disabled. Concededly, the circuit courts have been split on this question for some time. The Fifth, Sixth, Eighth, and Ninth Circuits have held that "regarded as" disabled employees are not entitled to accommodation. *See, e.g., Duello v. Buchannan Cnty. Bd. of Supervisors*, 628 F.3d 968, 972 (8th Cir. 2010) ("Under long-held circuit precedent, 'regarded as' plaintiffs are not entitled to reasonable accommodations because the ADA was not intended to grant reasonable accommodations to those who are not actually disabled."); *Kaplan v. City of N. Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003) (same); *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999) (same); *Newberry v. E. Texas State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998). The First, Third, Tenth, and Eleventh Circuits disagree, finding that the ADA's accommodation provision reaches "regarded as" disabled employees in addition to the actually disabled. *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1240 (11th Cir. 2005) (concluding employers do have duty to accommodate individuals regarded as having a disability); *Kelly v. Metallics W., Inc.*, 410 F.3d 670, 675-76 (10th Cir. 2005) (same); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 772-76 (3d Cir. 2004); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32-33 (1st Cir. 1996). The United States Court of Appeals for the Fourth Circuit has not yet decided this issue. *Shin v. Univ. of Maryland Med. Sys. Corp.*, 369 F.App'x 472, 480 n.15 (4th Cir. Mar. 11, 2010).

Nevertheless, several district courts in this circuit have concluded that "the better reasoned view appears to be that an employer has no duty under the ADA to accommodate a plaintiff alleging regarded as liability." *Blackburn v. Trs. Of Guilford Tech. Cmty. Coll.*, No. 1:09cv00497, 2010 WL 3310247, at *2 (M.D.N.C. Aug. 17, 2010) (quotation marks and citations omitted); *accord Bateman v. American Airlines, Inc.*, 614 F.Supp.2d 660, 672 (E.D.Va. 2009) ("Although this issue remains an open question in the Fourth Circuit, the majority view is that employers have no duty to offer a reasonable accommodation to employees who are merely regarded as disabled."); *Green v. CSX Hotels, Inc.*, 650 F.Supp.2d 512, 519 (S.D.W.Va. 2009) ("There is no dispute between the parties that employers are under no duty to offer reasonable accommodations to 'regarded as' plaintiffs."); *Betts v. Rector & Visitors of Univ. of Virginia*, 198 F.Supp.2d 787, 799 n.10 (W.D.Va. 2002) (finding employer had no duty to provide accommodation to "regarded as" plaintiff); *but see Dean v. Philip Morris USA Inc.*, No. 1:02CV149, 2003 WL 21754998, at *4 (M.D.N.C. July 29, 2003) (quoting *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 196 (3d Cir. 1999) for the proposition that the ADA "does not appear to distinguish between disabled and 'regarded as' individuals in requiring accommodation").

That consensus is grounded in sound logic or, as one court has put it, "common sense." *Powers v. Tweco Prods., Inc.*, 206 F.Supp.2d 1097, 1114 (D.Kan. 2002). Although the ADA rightfully intends to restore the damages "regarded as" disabled employees suffer because of disability discrimination,

it is an entirely different proposition to suggest that these employees deserve additional *benefits* despite their lack of any actual disability. Courts requiring accommodations for "regarded as" disabled employees seem to ignore this distinction. *See, e.g.*, *Kelly Metallics*, 410 F.3d at 676. "The central purpose of [the ADA and the ADEA] is to make the plaintiff 'whole.'" *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1338 (11th Cir. 1999). When a "regarded as" plaintiff is awarded damages for discrimination, he has presumably suffered real damages from real discrimination, even if the basis for the discrimination is illusory. In the accommodation context, however, he has not suffered any legally cognizable harm and there is nothing to make whole.

Forcing employers to accommodate "regarded as" employees in such a manner would "create a windfall for . . . employees who, after disabusing their employers of their misconceptions, would nonetheless be entitled to accommodations that their similarly situated co-workers are not, for admittedly non-disabling conditions." *Weber*, 186 F.3d at 917. Indeed, one might conclude that is happening in this case, where Young continually denied being disabled but claims a present entitlement to benefits that would only inure to her because of the fortuity of UPS's alleged mistake. In addition, providing damages for only illusory benefits would undermine the statutory purpose of the ADA "to provide *clear*, strong, *consistent*, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (emphasis added). If accommodations were offered to those "regarded as" disabled,

employers would be compelled to offer accommodations to an ever- changing class of individuals based on the employer's individual conceptions. That might simply lead the employer to offer accommodations and other resources to anyone even remotely impaired, which in turn "would potentially require employers to divert resources away from those truly disabled under the Act, thereby running the risk that employers might inadequately accommodate those who are actually disabled." *Bateman*, 614 F.Supp.2d at 673. Finally, as the Ninth Circuit has noted, mandating accommodation in "regarded as" circumstances would provide a strange incentive for impaired - but not disabled - employees actually to encourage their employers' misconceptions so as to qualify for accommodation. *See Kaplan*, 323 F.3d at 1232.

The 2008 Amendments to the ADA also adopt the view that accommodations need not be given to "regarded as" employees. *See* 42 U.S.C. § 12201(h) ("A covered entity . . . need not provide a reasonable accommodation . . . to an individual who meets the definition of disability in section 12102(1) of this title solely under subparagraph (C) of such section."; *see also* Allison Ara, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 Santa Clara L. Rev. 255, 276-77 (2010) ("Congress apparently agreed with the Fifth, Sixth, Eighth, and Ninth Circuits' determination that allowing reasonable accommodation for those who were 'regarded as' disabled would be bizarre."). Although those amendments do not apply to this case, the

amendments further buttress the notion that Congress never intended the accommodation provision to protect "regarded as" disabled employees. *See Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004) ("[C]ourts regularly view a conflict in the courts with regard to the proper interpretation of a statute . . . as an indication that Congress passed a subsequent amendment to clarify rather than change existing law.").

Because Young was not entitled to accommodation even if UPS regarded her as disabled, her remaining ADA claim must be dismissed.

IV. Motions to Continue and Compel

Young alternatively moves for a continuance under former Rule 56(f) of the Federal Rules of Civil Procedure. She argues that, before the court can grant summary judgment, she should be permitted to take additional discovery concerning (1) "information about additional comparators," and (2) the typical weights of the packages she delivered. (ECF No. 80, at 5, 6-7). She requests this discovery – and several other discovery items – in her third motion to compel. (ECF No. 78).

Pursuant to Rule 56(d), "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . defer considering the motion." "The purpose of the affidavit is to ensure that the nonmoving party is invoking the protections of Rule 56[(d)] in good faith and to afford the trial court the showing necessary to assess the merit of a party's

opposition." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quotation marks omitted). Rule 56(d) affidavits cannot simply demand discovery for the sake of discovery. Rather, the plaintiff must provide an affidavit that:

> . . . particularly specifies legitimate needs for further discovery and identifies which aspects of discovery required more time to complete. Indeed, the Fourth Circuit places great weight on the Rule 56[(d)] affidavit and, to that end, a party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56[(d)] to set out reasons for the need for discovery in an affidavit.

Amirmokri v. Abraham, 437 F.Supp.2d 414, 420 (D.Md. 2006) (quotation marks, citations, and brackets removed). A court also may deny a Rule 56(d) motion "where the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment." *Strag v. Bd. of Trs.*, 55 F.3d 943, 954 (4th Cir. 1995).

UPS takes issue with the technical sufficiency of Young's 56(d) submission, which consisted of a declaration signed by counsel attesting to the truthfulness of the facts in her motion and asking for additional discovery. Such a declaration seems sufficient. Even if it did lack

some formal requirement, it would nevertheless be appropriate to consider Young's motion because, at the very least, it "serve[s] as the functional equivalent" of a Rule 56(d) affidavit, and Young was "not lax in pursuing discovery." *Harrods*, 302 F.3d at 244-45.

Nevertheless, Young's technically sufficient motion must be denied, as the additional requested discovery would not create a genuine dispute of fact sufficient to defeat summary judgment. First, Young seeks additional evidence concerning relevant comparators. Although such information might be useful in establishing the fourth element of her prima facie PDA case, it would not correct the fact that Young has failed to demonstrate pretext. Moreover, the record reflects that UPS has in fact produced a substantial number of materials concerning employees whom UPS accommodated.

Second, Young requests additional discovery concerning the package weights that Young delivered, complaining that UPS has only provided package weights for a period *after* Young's pregnancy. She contends that she needs such evidence to establish that lifting heavier packages was not a business necessity. Once again, additional discovery would not serve any fruitful purpose because Young's own admissions effectively establish that lifting packages was a business necessity. She admitted that, at least on some occasions, she did in fact deliver packages. She also admitted that she had no control over the packages that she was given, and that UPS customers were free to send heavier packages. And her request for light duty when she initially sought to return to work is effectively a tacit

admission that her work as a driver at least sometimes entailed making heavier deliveries. Although she characterizes this lifting as a "tiny sliver" of her work, there can be no reasonable dispute that an essential element of working as a UPS delivery driver involves transporting and carrying packages of varying sizes from one location to another. As such, it would be inappropriate to force UPS to assume the burdensome task of parsing through complex billing records that might provide additional – but incomplete – information concerning package weights. In addition, Young admits that other employees had offered to carry her heavier packages around the time of her pregnancy. Thus, packages weights from around that time (which are primarily the weights that Young wishes to discover) are not especially useful in determining what package weights an ordinary UPS air driver would typically be expected to deliver.

As a more general matter, there is no reason to doubt that Young has had the opportunity to engage in sufficient discovery. For over two years now, following more than one extension, Young has had the chance to engage in comprehensive discovery, which has included several depositions covering a variety of subjects. *Cf. Pardo-Kronemann v. Donovan*, 601 F.3d 599, 612 (D.C. Cir. 2010) (refusing to reverse denial of motion to continue and stating, "After ten months of discovery, including multiple extensions, this decision hardly amounted to an abuse of discretion."). The court has twice granted motions to compel filed by Young. She may hope that additional discovery would produce more useful evidence, but "the mere hope that something might turn up in further discovery

does not satisfy the standard" of Rule 56(d). *Goodell v. Rehrig Int'l, Inc.*, 683 F.Supp. 1051, 1054 (E.D.Va. 1988).

Because the court finds no need to delay disposition of the summary judgment motion for unnecessary further discovery, the motion to compel and the motion for a continuance will both be denied.

V. Motions to Seal

Both parties have also submitted motions to seal. A motion to seal must comply with Local Rule 105.11, which provides:

> Any motion seeking the sealing of pleadings, motions, exhibits or other papers to be filed in the Court record shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protections. The Court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties. Materials that are the subject of the motion shall remain temporarily sealed pending a ruling by the Court. If the motion is denied, the party making the filing will be given an opportunity to withdraw the materials.

This rule endeavors to protect the common law right to inspect and copy judicial records and documents, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978), while recognizing that competing interests sometimes outweigh the public's right of access, *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984).

Before sealing any documents, the court must provide the non-moving party with notice of the request to seal and an opportunity to object. *Id.* This notice requirement may be satisfied by either notifying the persons present in the courtroom or by docketing the motion "reasonably in advance of deciding the issue." *Id.* at 234. Finally, the court should consider less drastic alternatives to sealing, such as filing redacted versions of the documents. If the court decides that sealing is appropriate, it should also provide reasons, supported by specific factual findings, for its decision to seal and for rejecting alternatives. *Id.* at 235.

Both parties seek to seal certain exhibits in connection with the motion for summary judgment; both motions currently stand unopposed after having been on the docket for several weeks. Young moves to seal certain exhibits produced by UPS under a "confidential" designation, which contain both personal employee information and certain sensitive corporate data. Under the terms of a consent protective order entered May 27, 2009, such information was provided to the court under seal. (*See* ECF No. 22 ¶ 2). In a similar vein, UPS moves to seal certain exhibits that contain sensitive medical information about some of its employees. This type of information may be appropriately sealed.

See Pittson Co. v. United States, 368 F.3d 385, 406 (4th Cir. 2004) (affirming decision to seal certain "confidential, proprietary, commercial, or financial data" that was produced under a protective order); *Briggs v. Marriott Int'l, Inc.*, 368 F.Supp.2d 461, 463 n.1 (D.Md. 2005) (sealing sensitive medical records). Moreover, both parties have moved to seal only a narrow class of exhibits – not all exhibits to the motion or the accompanying memoranda. Given the lack of objection, the sensitive nature of the information contained in the sealed documents, the indication that less-severe alternatives would prove unwieldy, and the small number of documents to be sealed, the court will grant both motions to seal.

VI. Conclusion

For the foregoing reasons, the motion to dismiss in part, the motion to compel, and the motion "to continue" will all be denied. The motion for summary judgment and both motions to seal will be granted. A separate order will follow.

/s/
DEBORAH K. CHASANOW

OPPOSITION BRIEF

No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondent

QUESTION PRESENTED

A collective bargaining agreement between UPS and petitioner's union specifies the circumstances in which employees who become unable to perform the essential functions of the job are eligible for accommodations such as modified work assignments. Petitioner became unable to perform the essential functions of her job due to a pregnancy-related lifting restriction, but was not eligible for an accommodation under UPS's pregnancy-neutral policy. She sued, claiming that UPS's adherence to that policy constituted disparate treatment under the Pregnancy Discrimination Act amendment to Title VII. The question presented is whether the Fourth Circuit correctly affirmed the grant of summary judgment to UPS on that claim.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

United States Parcel Service, Inc. is a publicly traded corporation and no public company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 707 F.3d 437. The memorandum and order of the district court granting summary judgment (Pet. App. 30a-83a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Pregnancy Discrimination Act of 1978 amended the "Definitions" section of Title VII to add the following:

> [1] The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and [2] women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

42 U.S.C. § 2000e(k) (reproduced at Pet. App. 84a).

STATEMENT

When petitioner became pregnant, her health care providers imposed a lifting restriction that precluded her from performing an essential function of her job as a delivery driver for United Parcel Service, Inc. (UPS). Her request for an alternative work assignment was denied under UPS's pregnancy-neutral accommodations policy, which is governed by a col-

lective bargaining agreement. Petitioner sued under Section 703 of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA). *See* 42 U.S.C. § 2000e-2(a)(1). The district court granted summary judgment for UPS, ruling that petitioner had presented no evidence of discrimination. Pet. App. 57a, 62a-63a. The court of appeals affirmed, ruling that petitioner had failed to prove a prima facie case of disparate treatment. *Id.* at 29a.

1. Respondent UPS is the world's largest package delivery company. In the United States, UPS operates a large fleet of vehicles to transport packages between customer homes and offices, UPS service centers, and transfer facilities. UPS's workforce is organized by the International Brotherhood of Teamsters, and the terms of employment are governed by an extensively negotiated collective bargaining agreement, which specifies (among many other things) the circumstances under which UPS must provide accommodations—such as temporary, alternative positions—to drivers who become unable to perform the essential functions of their jobs. *See* Dist. Ct. Dkt. 60-1 at 5. Petitioner was a member of the Teamsters union and subject to the terms of the collective bargaining agreement. Pet. App. 34a.

Petitioner was employed as an "air driver," a position that involves loading packages on a vehicle, transporting them, and then unloading them for delivery to customers or a service center. Accordingly, the essential functions of the air driver position—as with all UPS driving jobs—include the ability to lift packages weighing up to seventy pounds. Pet. App. 3a, 31a-32a. Petitioner admitted that she was periodically required to lift packages weighing more than twenty or even fifty pounds. *Id.* at 31a n.2.

In July 2006, petitioner requested a leave of absence to attempt *in vitro* fertilization, which was granted by UPS's occupational health manager, Carolyn Martin. Pet. App. 5a. After petitioner became pregnant, she sought to extend her leave temporarily, with the intention of returning to work during her pregnancy. *Ibid.* Two months later, petitioner provided her supervisor with a note from her doctor, which stated that she should not lift more than twenty pounds for the first twenty weeks of her pregnancy or ten pounds thereafter. *Ibid.* Petitioner's midwife later wrote a note confirming the twenty-pound lifting restriction. *Id.* at 5a-6a.

At some point after October 2006, petitioner asked to return to work, and she and Ms. Martin discussed that request. Ms. Martin "empathized with [petitioner's] situation and would have loved to help her." Pet. App. 7a (alterations and internal quotation marks omitted). Nevertheless, she explained that UPS's collectively bargained accommodations policy did not apply to petitioner.

Although positions are typically awarded by seniority under UPS's collective bargaining agreement, certain assignments may be temporarily provided to employees as accommodations for certain limitations. *See* Dist. Ct. Dkt. 60-1 at 8. *First*, the agreement requires UPS to give temporary work assignments to employees who are unable to perform their regular jobs because of injuries sustained on the job. Pet. App. 34a. *Second*, the agreement permits light-duty work as an accommodation for an employee who has a condition or impairment that restricts performance *and* otherwise qualifies as a disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* *Ibid.* *Third*, the agreement requires UPS to give an "inside job" to

drivers who lose their Department of Transportation (DOT) certification because of a failed medical exam, a revoked or suspended driver's license, or involvement in a motor vehicle accident. Petitioner has never contended that she qualified for an accommodation under any one of these categories.

The collective bargaining agreement neither requires nor authorizes UPS to disrupt the seniority system by giving temporary, alternative positions to employees unable to perform their normal work assignments due to *off-the-job* injuries or conditions (unless the resulting limitation amounts to a cognizable disability under the ADA). For example, a driver whose health care provider imposed a lifting limitation due to a back injury sustained off the job, and which was not an ADA-cognizable disability (*see Duncan v. Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114-15 (D.C. Cir. 2001) (en banc)), would not be eligible for an accommodation. Under its collectively bargained policy, UPS treats a lifting restriction resulting from pregnancy in exactly the same way. Pet. App. 4a.

Ms. Martin explained to petitioner that because her lifting restriction did not result from either an on-the-job injury or an ADA-cognizable disability, she was not eligible for an accommodation under the UPS policy. Pet. App. 6a-7a. According to Ms. Martin, she would have allowed petitioner to return to work if petitioner had provided a medical certification removing her lifting restriction. Ms. Martin also explained that, had she considered petitioner disabled within the meaning of the ADA, she would have encouraged petitioner to apply for an accommodation in accordance with UPS's policy. *Id.* at 7a.

By November 2006, petitioner's period of paid leave had expired. Pet. App. 8a. She then went on a period of unpaid leave. Petitioner gave birth on April 29, 2007, and returned to work for UPS at some point thereafter. *Ibid.*

2. Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex. Pet. App. 8a. The EEOC issued petitioner a right to sue letter in September 2008. One month later, petitioner brought a disparate treatment claim against UPS, seeking damages for sex discrimination under Title VII, as amended by the PDA. *Id.* at 8a-9a.[1]

Following extensive discovery, UPS moved for summary judgment in July 2010. Pet. App. 9a. The district court granted summary judgment for UPS on the grounds that petitioner (1) had not shown direct evidence of discrimination; (2) failed to establish a prima facie case of disparate treatment because she could not identify a similarly situated comparator who received more favorable treatment; and (3) could not show that UPS's nondiscriminatory application of a neutral policy was a mere pretext for discrimination. *Id.* at 9a-10a.

3. The Fourth Circuit affirmed. Based on a thorough review of the UPS-specific record evidence, the text and structure of the statutory provision invoked

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[1] Petitioner also brought a race discrimination claim under Title VII and a claim under the ADA. *See* Pet. App. 43a-44a. She did not pursue her race discrimination claim on appeal, and she does not challenge the court of appeals' ruling on her ADA claim in her petition for a writ of certiorari. *See* Pet. App. 9a n.5. Nor does she challenge the district court's refusal to allow her to add a disparate impact claim, which the court of appeals held was not an abuse of its discretion. *Id.* at 10a n.6.

by petitioner, and the decisions of its sister circuits, the panel unanimously concluded that petitioner had raised no genuine issue of material fact calling into question the district court's grant of summary judgment to UPS. Pet. App. 17a-29a.

a. *Record Evidence*: The court of appeals carefully examined the evidentiary submissions, including the employer-specific accommodations provisions of the UPS-Teamsters collective bargaining agreement, to consider whether petitioner had established a prima facie case of disparate treatment and concluded that she had not. Pet. App. 24a-25a, 27a-29a.

At the outset, the court of appeals considered and rejected petitioner's argument that UPS's policy of providing work accommodations to some employees and not others constituted direct evidence of discrimination. The court of appeals recognized that "an explicit policy excluding pregnant workers would violate antidiscrimination law," but determined that "no such policy exists here," because UPS had "crafted a pregnancy-blind policy." Pet. App. 18a. It therefore concluded that UPS's policy "is not direct evidence of pregnancy-based sex discrimination." *Id.* at 24a.

The court of appeals next considered whether petitioner had offered evidence sufficient to make out a prima facie case of disparate treatment under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which requires a claimant to show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action" and (4) *either* "that similarly-situated employees outside the protected class received more favorable treatment" *or* that the "allegedly adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination" Pet. App. 25a-

26a & n.17 (alteration and internal quotation marks omitted).

The court of appeals accepted that petitioner had satisfied the first three elements and explained that the dispute centered on the final element. Pet. App. 26a-27a. As to that inquiry, petitioner and UPS "sharply disagree[d] about who constitute[d] an appropriate 'comparator.'" *Id.* at 27a. While petitioner sought to compare herself to employees accommodated under the ADA, drivers who had lost their DOT certification, and employees injured on the job, UPS compared petitioner to those employees subject to a lifting restriction caused by an off-the-job injury or condition. *Ibid.*

The court of appeals reiterated that UPS's accommodations policy was "neutral" and "pregnancy-blind," and ruled that petitioner could "no more successfully" indirectly attack that policy "than she could directly." Pet. App. 27a. The court of appeals further explained why a pregnant worker with a temporary lifting restriction is not similar to employees entitled to accommodations with respect to an "ability or inability to work." *Ibid.* Specifically, the court reasoned that petitioner is dissimilar to an employee disabled under the ADA because, unlike the ADA-disabled employee, petitioner's lifting restriction was only temporary and not otherwise "a significant restriction on her ability to perform major life activities." *Ibid.* The court also determined that petitioner is dissimilar to an employee who lost his or her DOT certification because petitioner was not legally precluded from driving a UPS vehicle and because petitioner had a lifting restriction. Finally, the court explained that petitioner differs from an employee injured on the job because petitioner's inabil-

ity to perform the essential functions of the job did not arise from an on-the-job injury. *Id.* at 27a-28a.

b. *Statutory text and structure*: The court of appeals held that Section 703 of Title VII, as amended by the PDA, does not require "employers to grant pregnant employees a 'most favored nation' status with others based on their ability to work, regardless of whether such status was available to the universe—male and female—of nonpregnant employees." Pet. App. 19a. This conclusion was based on the text and structure of the PDA amendment. *Id.* at 20a-21a.

The court of appeals rejected petitioner's contention that the second clause of the PDA should be read broadly to require different—indeed preferential—treatment for pregnant workers. Pet. App. 20a-21a. The court explained that "the second clause does not stand alone; it follows the first clause." *Id.* at 20a. The court concluded that the second clause's "placement in the definitional section of Title VII, and grounding within the confines of sex discrimination under § 703, make clear that [the PDA] does not create a distinct and independent cause of action." *Id.* at 20a-21a.

Moreover, the court of appeals explained how petitioner's reading of the second clause would lead to "anomalous consequences," *e.g.*, "pregnancy would be treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII." Pet. App. 21a. To illustrate this point, the court compared petitioner to an employee who injured his back picking up a child, and to an employee who sustained an injury arising from her off-the-job work as a volunteer firefighter. The court explained that, if it were to accept petitioner's

interpretation of the PDA, only petitioner—but not either of the other employees injured off the job—would be eligible to receive an accommodation. *Id.* at 22a. The court concluded that "[s]uch an interpretation does not accord with Congress's intent in enacting the PDA" and "would thus imbue the PDA with a preferential treatment mandate that Congress neither intended nor enacted." *Id.* at 22a-23a.

c. *Analogous Decisions*: The court of appeals found further confirmation for its ruling in opinions from its sister circuits regarding the proper construction of the PDA. Pet. App. 21a. Specifically, the courts of appeals that have considered the issue have unanimously reasoned that adopting petitioner's interpretation of the PDA would "transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees." Pet. App. 21a-22a (citing *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998); and *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)). Although the court noted that it "disagree[d] with [the] analysis" of the sole authority put forward by petitioner, *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996), it was also "unpersuaded" that the case actually "effect[ed] the watershed change" that petitioner "ascribed to it." Pet. App. 23a.

ARGUMENT

When petitioner requested an accommodation for her pregnancy-related lifting restriction, UPS treated petitioner in exactly the same way it treats *all* employees—regardless of pregnancy—who are unable to perform essential functions of the job as a result of an off-the-job injury or condition. UPS's accommodations policy, as set forth in a detailed and extensively negotiated collective bargaining agreement, provides for temporary, alternative work assignments only in the case of drivers who suffer an on-the-job injury, have an ADA-covered disability, or lose their DOT certification. Petitioner fell into none of these categories; thus the accommodation she requested would have required UPS to give her preferential treatment in contravention of the collective bargaining agreement. The court of appeals concluded that UPS's adherence to its pregnancy-neutral accommodations policy did not constitute "disparate treatment" under Title VII as amended by the Pregnancy Discrimination Act. That decision is correct, and does not conflict with any decision of this Court or of any other court of appeals. It does not warrant further review.

I. THE DECISION BELOW IS CORRECT

The Fourth Circuit correctly determined that UPS was entitled to summary judgment on petitioner's sex discrimination claim. The application of UPS's pregnancy-blind accommodations policy to petitioner does not constitute "disparate treatment" prohibited by Title VII as amended by the PDA. The contrary view advanced by petitioner and her *amici* cannot be reconciled with the statute's text, structure, or purpose.

1. Title VII prohibits discrimination in employment "because of sex." 42 U.S.C. § 2000e-2(a)(1). In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court grappled with whether employers could legally exclude conditions related to pregnancy from a comprehensive sickness benefits plan that covered other off-the-job sicknesses. It ruled that the prohibition against sex discrimination did not extend to discrimination on the basis of pregnancy.

In direct response to *Gilbert*, Congress enacted the PDA to clarify that sex discrimination includes discrimination on the basis of pregnancy. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987). Congress therefore did not intend to provide an independent cause of action for pregnant workers and instead placed the entirety of the PDA into the "Definitions" section of Title VII. *See* 42 U.S.C. § 2000e(k).

Petitioner and her *amici* assert that the PDA's second clause removes the baseline requirement that differential treatment occur "because of or on the basis of pregnancy" to qualify as sex discrimination. Even if a neutral policy is not enacted or implemented "because of" pregnancy or "on the basis of" pregnancy, they reason, it may still violate the PDA if the effect is to deny some pregnant women benefits that are available to at least one person similar in her "ability or inability to work." Petitioner and *amici* insist that this must be the case even if pregnant women are treated the same as others "similar in their ability or inability to work." Pet. 10-16; Amicus Br. 4-11.

This construction violates the "cardinal rule" that "a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Both peti-

tioner and her *amici* read "the second clause" in isolation, but the PDA is in fact a single sentence. The semicolon does not permit this Court to divorce the first half of the sentence from the second half; both halves must be considered *together*. As this Court explained, the "meaning of the first [half]" of the PDA is in no way "limited by the specific language in the second [half]." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983). Rather, the first clause makes clear that pregnancy-based discrimination constitutes sex discrimination and the second clause merely "explains the application of the general principle to women employees." *Ibid.*

Indeed, it is "well established" that Congress intended this construction to overturn both the reasoning and outcome of *Gilbert*. *Guerra*, 479 U.S. at 284. "By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*." *Ibid.* Similarly, the second clause "was intended to overrule the holding in *Gilbert*." *Id.* at 285. In other words, it is not enough that petitioner show that she did not receive an accommodation available to *any* other employee, regardless of the reason. Instead, petitioner must show that pregnancy was singled out for exclusion (as it was in *Gilbert*).

Furthermore, both clauses were placed in the "Definitions" section of Title VII, which "merely elucidates the meaning of certain statutory terms"—*i.e.*, "because of" or "on the basis of" sex—and "proscribes no conduct." *Carr v. United States*, 130 S. Ct. 2229, 2237 n.6 (2010). Read as a whole, the PDA merely prohibits employers from using *pregnancy* as a criterion on which to grant or deny benefits. Plainly, the

law does not prevent employers from using *other* criteria to determine whether employees are entitled to an accommodation, such as (for example) whether or not the limitation for which the employee seeks accommodation was itself employment-related. Because UPS's accommodations policy does not distinguish between employees "because of" or "on the basis of" pregnancy, it does not run afoul of the PDA.

Finally, petitioner ignores Section 703(h) of Title VII, which provides that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different conditions [] or privileges of employment pursuant to a bona fide seniority or merit system provided that such differences are not the result of an intention to discriminate because of sex[.]

42 U.S.C. § 2000e-2(h). "The unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (alterations and internal quotation marks omitted). Petitioner does not dispute that the UPS-Teamsters collective bargaining agreement is seniority-based. Accordingly, petitioner cannot challenge its application because she failed to prove that the agreement in general, or the accommodations policy in particular, was adopted with any discriminatory intent.

2. As this Court has recognized, "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085

n.14 (1983) (plurality opinion). Those principles require a level playing field; they do not mandate preferential treatment for any member of a protected group. *See Guerra*, 479 U.S. at 287.

The Senate Report on the PDA states that the Act "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy and related medical conditions] peculiar to women; *it does not change the application of title VII to sex discrimination in any other way.*" S. Rep. No. 95-331, at 3-4 (1977) (emphasis added). Likewise, the House Report states that "[p]regnancy-based distinctions will be subject to the *same scrutiny on the same terms as other acts of sex discrimination* proscribed in the existing statute." H.R. Rep. No. 95-948, at 4 (1978) (emphasis added).

It is clear that Congress did not require employers to equate pregnancy with on-the-job conditions, as petitioner would have it. Indeed, the legislative history is rife with examples specifically allowing employers to treat pregnant employees the same as employees injured off the job. In a floor statement intended to "dispel" a "few myths surrounding the bill," then-Senator Biden, one of the co-sponsors of the PDA, explained that the Act "simply requires" that "disability due to pregnancy must be treated the same as any other non-work-related disability." 123 Cong. Rec. 29640, 29660 (1977). Senator Culver confirmed this point when he explained that the PDA requires employers "to treat pregnancy-related disabilities the same as any other nonwork related disability[.]" *Id.* at 29663. *See also* 124 Cong. Rec. 21434, 21436 (1978) (remarks of Rep. Sarasin) (PDA "would not require extending coverage beyond job-related disability").

As this Court has previously observed, "the legislative history is *devoid* of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment." *Guerra*, 479 U.S. at 286 (emphasis added) (footnote omitted). Indeed, there is only one direct reference in the legislative history to preferential treatment, in which Senator Brooke "emphasize[d] most strongly that [the PDA] in no way provides special disability benefits for working women." 123 Cong. Rec. at 29664. The legislative history thus makes clear that, in amending Title VII, Congress did not "inten[d] to require preferential treatment" of pregnant workers. *Guerra*, 479 U.S. at 287.

3. Requiring UPS to accommodate petitioner's pregnancy-based limitation, even though similarly situated employees would not be similarly accommodated, would treat pregnancy more favorably than *any* other basis covered by Title VII. *Cf. Hardison*, 432 U.S. at 79-80 (employer need not adapt to employee's worship schedule where doing so would conflict with a neutral policy). Indeed, the interpretation of the PDA now advanced by petitioner and her *amici* would require employers to provide benefits to pregnant workers even over *disabled* workers—as long as those benefits were provided to others "similar in their ability or inability to work." *Cf. Raytheon Co. v. Hernandez*, 540 U.S. 44, 54-55 (2003) (a neutral no-rehire policy is a nondiscriminatory reason sufficient to defeat a prima facie case of disability discrimination).

In fact, petitioner's position cannot be reconciled with this Court's decision in *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), which explained that the PDA does not bestow most favored nation status to preg-

nant workers above all others. In that case, a pregnant employee brought a PDA suit to challenge her employer's pension plan, which gave less retirement credit for pregnancy than for medical leave. The employer argued that its pension plan came within the exemption for bona fide seniority systems. *Id.* at 707-08. Although the plaintiff pointed to the PDA's second clause to explain why the exemption should not apply, this Court rejected that argument, reasoning that the plaintiff's reading of the PDA "would result in the odd scenario that pregnancy discrimination, alone among all categories of discrimination (race, color, religion, other sex-based claims, and national origin), would receive dispensation from the general application of [this exemption]." *Id.* at 709 n.3.

Moreover, petitioner's construction would allow courts to override the terms of collective bargaining agreements, contravening the legions of federal court decisions to hold that such agreements are ordinarily controlling. *See, e.g., Hardison*, 432 U.S. at 80-82; *Eckles v. Conrail*, 94 F.3d 1041, 1047-48 (7th Cir. 1996) (collecting cases); *cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (Congress did not intend for an employer to override its seniority-based system to accommodate a qualified individual with a disability). Petitioner's contention that the accommodations policy adopted as part of the UPS-Teamsters collective bargaining agreement is unlawful cannot be reconciled with this Court's decisions holding that, "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences." *Hardison*, 432 U.S. at 82; 42 U.S.C. § 2000e-2(h).

Contrary to petitioner's contention (Pet. 8), it is neither "modest" nor "slight" for a court to set aside a

collective bargaining agreement—especially where, as here, no unfair labor practice is alleged. Indeed, petitioner is essentially asking to jump the line in the seniority system, which would "undermine [other] employees' expectations of consistent, uniform treatment—expectations upon which the seniority system's benefits depend." *Barnett*, 535 U.S. at 404. Tellingly, the collective bargaining agreement is never mentioned in the Argument section of either petitioner's or *amici's* brief.

II. There Is No Conflict Of Decision Warranting This Court's Review

In accordance with the Fourth Circuit, every court of appeals to have considered the question has concluded that the application of a facially neutral policy providing benefits to certain types of employees but not others does not constitute "disparate treatment" prohibited by Title VII, even when that policy is applied to individuals with pregnancy-related restrictions. Contrary to petitioner's submission, there is no conflict in the circuits that merits this Court's attention.

A. The Courts Of Appeals Unanimously Recognize That A Pregnancy-Blind Accommodations Policy Does Not Constitute Disparate Treatment.

Petitioner contends that there is "longstanding disagreement in the circuits" regarding "whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Pet. i, 16 (capitalization altered). Not so.

All of the courts of appeals that have addressed this issue agree that a plaintiff may prove sex discrimination by either direct or circumstantial evidence and that there are several heuristics that courts may use in evaluating circumstantial evidence. And all circuits agree that the application of a pregnancy-blind policy—such as the collective bargaining agreement at issue here—does not constitute "disparate treatment" prohibited by Title VII. The courts of appeals therefore hold that the application of such policies, standing alone, does not prove sex discrimination on the basis of pregnancy.

1. In accordance with this Court's precedents, the circuits unanimously agree that courts must apply standard Title VII analysis to pregnancy discrimination claims. *See, e.g., Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 993-94 (8th Cir. 2011); *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420-21 (1st Cir. 1996). Indeed, no circuit has ever agreed with petitioner's position that the PDA requires employers to bestow a most favored nation status on pregnant employees.

A plaintiff may choose to make out a prima facie case of pregnancy discrimination through either direct evidence or indirect evidence using the burden-shifting framework of *McDonnell Douglas* and its progeny. The fourth element under that framework, and the only one in dispute here, is whether the decision or action occurred under circumstances giving rise to an inference of discrimination based on membership in a protected class. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

One way a plaintiff can establish the fourth element of the prima facie case is to prove that she was

treated less favorably than similarly situated employees who were not in her protected class. But that is not the only way. The circuits are in agreement that a plaintiff may use non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination. *See, e.g.*, *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1255 (11th Cir. 2012); *Timmons v. GMC*, 469 F.3d 1122, 1126 (7th Cir. 2006); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 n.7 (10th Cir. 2000).

Under the *McDonnell Douglas* framework, a plaintiff cannot prove discrimination through indirect evidence solely by making out a prima facie case. Rather, once a plaintiff makes out a prima facie case, the defendant may articulate a legitimate nondiscriminatory reason for its actions. If the defendant does so, whether the employee properly made out a prima facie case "is no longer relevant." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). It is then up to the plaintiff to show that the articulated reason is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 254-56. Here, the district court ruled that even if petitioner had stated a prima facie case, her claim failed at the pretext stage. The court of appeals did not disturb that determination.

2. The courts of appeals are unanimous in recognizing that pregnancy-blind policies of the type at issue here, standing alone, are insufficient to prove discrimination, either directly or indirectly. As noted, the Fourth Circuit held that a policy of providing accommodations to some employees (such as those disabled under the ADA or those injured on the job) but not others (such as those injured off the job) is insufficient evidence of pregnancy discrimination. Pet. App. 24a-25a, 27a-29a. Other circuits agree.

a. *Fifth Circuit*: In *Urbano v. Continental Airlines*, 138 F.3d 204 (5th Cir. 1998), an employee challenged her employer's policy of granting light-duty assignments only to workers who suffered occupational injuries. A unanimous panel of the Fifth Circuit affirmed the grant of summary judgment to the employer, reasoning that "the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women." *Id.* at 208. Because the employer treated the pregnant employee "the same as it treat[ed] any other worker who suffered an injury off duty," the Fifth Circuit explained that (1) the plaintiff did not make out a prima facie case and (2) there was "no probative evidence that [the policy] was a pretext for discrimination against pregnant women." *Ibid.* This Court denied the petition for certiorari. 525 U.S. 1000 (1998).

b. *Sixth Circuit*: In *Reeves v. Swift Transportation Co.*, 446 F.3d 637 (6th Cir. 2006), an employee brought suit against her former employer, which had terminated her pursuant to a pregnancy-blind policy denying light-duty work to employees who were not injured on the job and who otherwise could not perform the essential functions of the job. A unanimous panel of the Sixth Circuit affirmed the grant of summary judgment to the employer, reasoning that the policy did not constitute either direct or indirect evidence of discrimination because it was "pregnancy-blind" and the PDA "merely requires employers to 'ignore' employee pregnancies." *Id.* at 640-42. The Sixth Circuit concluded there was no evidence that the employer adopted its policy as a pretext for pregnancy discrimination. *Id.* at 642. It also expressly "accept[ed]" the "reasoning of the Fifth and Eleventh circuits rejecting claims materially identical to [the employee's]." *Ibid.*

c. *Seventh Circuit*: In *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011), an employee challenged her employer's modified work policy which provided accommodations only to qualified individuals with an ADA-cognizable disability or to those employees who sustained work-related injuries. A unanimous panel of the Seventh Circuit affirmed the grant of summary judgment to the employer, reasoning that the policy did not constitute direct evidence of discrimination because it was "pregnancy-blind," which "is all the PDA requires." *Id.* at 548-49. The Seventh Circuit also determined that the employee had not established a prima facie case of disparate impact under *McDonnell Douglas* because she had not shown that a similarly situated, nonpregnant employee was treated more favorably. *Id.* at 551-52.

d. *Eleventh Circuit*: In *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1039 (11th Cir. 1999), an employee challenged her employer's modified work policy providing light-duty work to employees who suffered from work-related injuries. A unanimous panel of the Eleventh Circuit affirmed the grant of summary judgment to the employer, reasoning that the employee had not offered direct or circumstantial evidence of discrimination. *Id.* at 1312-13. The Eleventh Circuit cited the Fifth Circuit's decision in *Urbano* and concluded that the employer "was under no obligation to extend [the] accommodation to pregnant employees" because the "PDA does not require that employers give preferential treatment to pregnant employees." *Id.* at 1312. The Eleventh Circuit also held that the "correct comparison is between [the pregnant employee] and other employees who suffer non-occupational disabilities, not between [the pregnant employee] and employees who were injured on

the job" because the PDA requires employers to "ignore an employee's pregnancy and treat her as well as it would have if she were not pregnant." *Id.* at 1313 (internal quotation marks omitted).

e. *Third and Eighth Circuits*: Although the Third and Eighth Circuits have not squarely considered and decided the issue, their rulings indicate that they would join the other circuits in holding that the application of a pregnancy-blind policy is not sufficient proof of pregnancy discrimination. These circuits agree that it is not unlawful under the PDA to take an adverse employment action against a pregnant employee if the employer would have taken that action against an employee who suffered from a "different temporary disability," reasoning that the "PDA is a shield against discrimination, not a sword in the hands of a pregnant employee." *In re Carnegie Ctr. Assocs.*, 129 F.3d 290, 297 (3d Cir. 1997) (holding that employee on maternity leave could be treated in same manner as any other temporarily disabled employee not at work); *Adams v. Nolan*, 962 F.2d 791, 794-95 (8th Cir. 1992) (treating a policy which "purports to apply to anyone with a 'non-work-related injury or illness'" as "a facially nondiscriminatory policy"); *cf. Walker v. Fred Nesbit Distrib. Co.*, 156 F. App'x 880, 884 (8th Cir. 2005) (per curiam).

B. The Assertedly Conflicting Decisions Involve An Immaterial Aspect Of The Analytical Framework.

Petitioner does not dispute that the courts of appeals are in substantial agreement regarding the application of the PDA to situations like this one, nor does she seriously argue that this case would have been decided differently had it been brought in a different circuit. Instead, petitioner strives mightily to

manufacture a conflict between the decision below and the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), as well as dicta from the Tenth Circuit's decision in *Horizon/CMS Healthcare Corp.* Pet. 17-19.

The circuit "split" contrived by petitioner merely reflects varying modes of reasoning that lead to the same result, *viz.*, that the application of a neutral accommodations policy to all workers, pregnant or not, does not constitute "disparate treatment" prohibited by Title VII. To the extent the Sixth Circuit diverges from others, the divergence is limited to a single—and ultimately inconsequential—aspect of the multifactor *McDonnell Douglas* test. In fact, the Sixth Circuit in *Reeves* limited its previous decision in *Ensley-Gaines* to its facts. The purported "split" is thus not a basis for certiorari review. *See* Sup. Ct. R. 10; *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Ensley-Gaines will not bear the weight petitioner places on it. In that case, an employee alleged that her employer had discriminated against her while she was pregnant. Specifically, the employee complained that her employer gave her "light-duty status in name only because she was not permitted to sit while working, and after standing for the four hours allowed by her pregnancy restriction, she was sent home." 100 F.3d at 1223. The employee identified a number of nonpregnant, temporarily disabled employees who were allegedly treated more favorably than she was, including one employee with an off-the-job injury who was permitted to sit part of the time and three employees with on-the-job injuries who regularly received full-time work. *Ibid.*

The Sixth Circuit explained that the employee could establish a prima facie case of discrimination under Title VII through "the test established by the Supreme Court in *McDonnell Douglas*." 100 F.3d at 1224. "At the center" of the appeal, the court stated, was the fourth prong of the *McDonnell Douglas* framework, *i.e.*, the district court had determined that persons with on-the-job injuries were not "similarly situated" to the employee. *Ibid.* The Sixth Circuit concluded that the employee was similarly situated to persons with occupational injuries, and that because those persons were afforded better treatment, the employee had established a prima facie case of discrimination. *Id.* at 1226.

The conclusion that the employee had established a prima facie case did not end the analysis in *Ensley-Gaines*, however. The court next considered whether the employer had articulated legitimate, nondiscriminatory reasons for its actions, and whether the employee had offered contrary evidence to show that those reasons were pretextual. 100 F.3d at 1227. Although the employer stated that the employee was not allowed to sit on a stool for safety and efficiency reasons, the court determined that the employee had met her burden in evincing pretext, because she provided evidence that "other individuals were permitted to use stools and use of the stool did not pose any safety risks." *Ibid.* It was this evidence—and not evidence about any pregnancy-blind policy—that led the court to conclude that summary judgment was inappropriate. *Ibid.*

The Sixth Circuit's subsequent decision in *Reeves* confirms that *Ensley-Gaines* must be read narrowly. *Reeves* holds, in conformance with all the other circuit-level authority cited above, that the application of pregnancy-blind policies similar to the one at issue

in this case "cannot be viewed" as direct evidence of discrimination or evidence of pretext "because the Act merely requires employers to 'ignore' employee pregnancies." 446 F.3d at 641. *Reeves* distinguished *Ensley-Gaines* as a case which "primarily dealt with whether a prima facie case had been established under the Pregnancy Discrimination Act." *Id.* at 641 n.1. The reasoning of *Ensley-Gaines*, the court concluded, did "not control [the *Reeves*] case at the pretext stage of the *McDonnell Douglas* analysis. The facts that prompted [the court] in *Ensley-Gaines* to find a genuine issue of material fact at the pretext phase ha[d] no parallel in [*Reeves*]." *Ibid.* *Reeves* thus confirms that the reasoning of *Ensley-Gaines* is limited to a *singular* aspect of the *McDonnell Douglas* framework—and does not stand for the sweeping proposition that pregnancy-blind policies are sufficient evidence of discrimination in and of themselves.

Petitioner's reliance on *Horizon/CMS Healthcare Corp.*, which also concerned a pregnancy-blind policy, has even less basis. Pet. 18-19. Contrary to petitioner's suggestion, the Tenth Circuit applied the *same* Title VII analysis as the Fourth Circuit did here, holding that "[c]laims brought under the PDA are analyzed in the same way as other Title VII claims of disparate treatment." 220 F.3d at 1191, 1195 n.7. The Tenth Circuit recognized that the PDA—like other Title VII disparate treatment claims—requires a finding of intentional discrimination. And it concluded that a policy distinction between on-the-job injuries and off-the-job conditions was a legitimate nondiscriminatory reason for denying a light-duty accommodation to pregnant employees "[b]ecause nothing in the PDA requires an employer to give preferential treatment to pregnant employees." *Id.* at 1195 n.7. Ultimately, the Court

reversed the grant of summary judgment based on the specific evidence of pretext in that case that is not present in *this* case. *Id.* at 1200-12.[2]

Indeed, this case would have been decided the same way in the Sixth or Tenth Circuits. Neither *Ensley-Gaines* nor *Horizon/CMS Healthcare Corp.* establishes that pregnancy-blind policies of the type at issue here are evidence of discrimination. *Ensley-Gaines* establishes at most that an employee may state a prima facie case of sex discrimination by proffering evidence that she was treated less favorably than another temporarily disabled employee. But the prima facie case ultimately "drops out of the picture" once the defendant proffers a nondiscriminatory reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). *Reeves* and *Horizon/CMS Healthcare Corp.* show that the application

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[2] Although petitioner argues that this Court owes deference to the EEOC's position in *Horizon/CMS Healthcare Corp* (Pet. 10 n.3), she conveniently ignores that the EEOC specifically "waived off" the argument that "any distinction between non-work-related conditions and work-related conditions, in a modified duty policy, is per se unlawful." EEOC Br. in Resp. to Pet. for Reh'g En Banc, *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (No. 98-2328), *available at* http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (last visited June 6, 2013). Indeed, the *actual* position advanced by the EEOC is consistent with its guidance that "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." Press Release, EEOC, EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute (Sept. 4, 1996), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (last visited June 6, 2013).

of a pregnancy-blind policy constitutes a nondiscriminatory reason for an employer's actions, and the decision to treat employees with on-the-job injuries better than those with off-the-job injuries—including pregnant women—is ultimately insufficient to evince discrimination at the pretext stage.

As in *Reeves*, petitioner's claim failed at the pretext stage. UPS proffered a nondiscriminatory reason for its actions: It contended that it would not permit petitioner to return to work with the lifting restriction because she could not perform the lifting required of drivers and its neutral policy did not permit an accommodation. *See* Pet. App. 7a. Petitioner cannot genuinely dispute that delivery drivers must be capable of performing heavy lifting (*id.* at 3a, 31a-33a), and courts have held in unison that the application of a neutral policy is a legitimate, nondiscriminatory reason to deny an accommodation. *Cf. Raytheon*, 540 U.S. at 51-52 ("[A] neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA"). In any event, defendant's burden to proffer a nondiscriminatory reason for its actions "is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson*, 530 U.S. 133, 142 (2000) (internal quotation marks omitted). "Accordingly, the *McDonnell Douglas* framework—with its presumptions and burdens—disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Id.* at 142-43 (internal quotation marks and citations omitted).

Petitioner complains that the "[d]enial of workplace accommodations to pregnant workers [where] other employees receive them is a particularly common fact pattern" (Pet. 7), but that is not the fact pattern of this case. Rather, the fact pattern here is much closer to that in *Reeves*. Just like in *Reeves*,

there was no credible evidence that UPS's policy was unevenly enforced. And just like in *Reeves*, the district court determined that UPS was entitled to summary judgment because petitioner proffered no plausible evidence to cast doubt on UPS's reasons for denying the accommodation. Pet. App. 62a-63a. Any divergence in the case law thus relates to one ultimately inconsequential aspect of the *McDonnell Douglas* test. This is reason alone to deny the petition. *Cf. Gamache v. California*, 131 S. Ct. 591, 593 (2010) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari) (denying certiorari where resolution of an aspect of case would not have altered the ultimate decision).

Petitioner and her *amici* recognize that they have convinced no appellate judges to adopt their views; indeed, *amici* go so far as to contend that all of the circuits are "mistaken." Amicus Br. 11. Rather than rely on law, both petitioner and her *amici* cite several academic commentaries advocating that, for policy reasons, pregnant workers should receive preferential treatment. That is an argument better directed to Congress, not the Judiciary. Indeed, although several States have adopted pregnancy statutes that could require accommodations in circumstances similar to those of this case (*see, e.g.*, Cal. Gov't Code § 12945(a)(3); Conn. Gen. Stat. § 46a-60(a)(7); *cf.* La. Rev. Stat. Ann. § 23:342(4)), the federal Congress has considered but rejected analogous legislation. *See, e.g.*, Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012) (not enacted); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012) (not enacted).

As to the legal question actually presented to and decided by the courts below in this case, the courts of appeals are entirely consistent in construing the

PDA that Congress has enacted. Petitioner's disparate treatment claim would not have survived a motion for summary judgment in any circuit. Thus, there is no need for this Court's review.

III. THIS CASE IS A POOR VEHICLE

1. In light of the recent amendments to the ADA (*see* Amicus Br. 11-14), the scenario in this case may never be repeated. In 2008, the Americans with Disabilities Act Amendment Act (the ADAAA) and its implementing regulations modified the definition of disability to include disabilities of limited duration. *See* 42 U.S.C.A. § 12101; 29 C.F.R. § 1630.2(i) & (j). Because Congress did not make the ADAAA retroactive, the court of appeals explained that it would not consider how the ADAAA's amendments affected petitioner's claims. Pet. App. 11a n.7. *Amici* contend that a person with a temporary lifting restriction is now disabled under the ADA (thus widening the gap between ADA disabled employees and pregnant employees (Amicus Br. 13)), but that might be true for a pregnant worker with a similar lifting restriction. *See, e.g.*, EEOC, *Facts About Pregnancy Discrimination*, *available at* http://www.eeoc.gov/facts/fs-preg.html (last visited June 6, 2013). In cases where the new amendments apply, courts will have to determine the validity of this argument—which was not presented at all in this pre-ADAAA case. Given the recent and dramatic expansion of the ADA, the Court should wait to see if the situation presented here ever repeats itself.

2. Petitioner essentially asks this Court to second-guess what she perceives to be erroneous factual findings on the summary judgment record. Indeed, petitioner challenges everything from the district court's finding that she was not similarly situated to her proposed comparators (Pet. 9-10) to its finding that drivers who lost their DOT certification

were not entitled to light work but only an "inside job"—which involves lifting (*id.* at 4). The Fourth Circuit left these findings untouched. Further review is unwarranted. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

3. The remainder of petitioner's and her *amici's* arguments evince their plan to use certiorari review as a backdoor attempt to add a disparate impact claim to petitioner's complaint, even though the courts below rejected her belated attempt to plead such a claim. *See* n.1, *supra*.

Amici state that UPS's decision to "accommodate[] multiple categories of employees, while refusing to accommodate pregnant women, establishes a formal policy of discrimination." Amicus Br. 8. This is nonsense. The policy is clearly pregnancy-blind: It does not *exempt* pregnant women altogether but accommodates them as long as they are injured on the job; lose their DOT certification; or suffer from an ADA qualifying disability.

If accepted, this theory would work a wholesale expansion of discrimination law. In a disparate treatment case like this one, "liability depends on whether the protected trait actually motivated the employer's decision and had a determinative influence on the outcome." *Reeves*, 530 U.S. at 141 (internal quotation marks and citations omitted). *Amici* ignore that bedrock principle to seek a ruling that an employer who accommodates one category of employees pursuant to a collective bargaining agreement must extend the same accommodation to pregnant employees—regardless of its motivation in crafting that agreement with the union. So, for example, *amici* would ask this Court to conclude that a policy providing accommodations only to those who

have lost a limb is discriminatory—even in the absence of any evidence of animus toward pregnant women. Notwithstanding *amici's* assertions, it is not a "formal policy of discrimination" for an employer to decline the same accommodation to a pregnant woman who has not lost a limb. Indeed, an employer would provide *preferential* treatment—not equal treatment—if it granted the accommodation in violation of the agreement.

Petitioner and her *amici* badly misread *International Union v. Johnson Controls*, 499 U.S. 187 (1991), and *Guerra*, for the proposition that an employer's motivation in enacting a facially neutral policy is irrelevant. *See* Pet. 11, 15-16; Amicus Br. 9-12. *Johnson Controls* involved a facially discriminatory policy in which an employer excluded fertile female employees from certain jobs because of its purported concern for the health of potential fetuses. *See* 499 U.S. at 199. This Court merely held that a nondiscriminatory purpose cannot save a *facially discriminatory* policy. *Id.* at 199-200. That case is therefore inapposite because UPS's policy is *facially neutral*. Nor does *Guerra* hold that an employer's motive is irrelevant; indeed, that case did not involve disparate treatment at all, but considered merely whether the PDA preempted state laws that appeared to provide preferential treatment to women. *Guerra*, 479 U.S. at 284-90.

In a last-ditch attempt to convince the Court that this case is cert-worthy, petitioner and *amici* switch tactics and argue that, at the very least, the Fourth Circuit should have compared petitioner to those injured on the job, those with ADA cognizable injuries, and those who lost their DOT certification. Pet. 15-16; Amicus Br. 9-10. But this is wrong, too. As this Court has recognized, the prima facie case requires

"evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (alterations and internal quotation marks omitted). In other words, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination." *Id.* at 311-12 (holding that certain comparator evidence was "not a proper element of the *McDonnell Douglas* prima facie case" because it "lack[ed] probative value"). Here, there is no logical connection between the application of UPS's neutral policy and the alleged sex discrimination because the policy does not raise any inference whatsoever that UPS has animus directed specifically at pregnant workers. It would thus be nonsensical to compare petitioner to anyone other than those in her position, *i.e.*, those with off-the-job injuries or conditions. Because petitioner was treated exactly the same as other employees who had non-disabling restrictions as a result of off-the-job injuries or conditions, she cannot make out a prima facie case of disparate treatment.

While petitioner contends that this Court cannot allow pregnancy-blind rules to "insulate" an employer from liability (Pet. 8), she misses that such rules are simply not actionable in a disparate treatment case. Indeed, only in a disparate *impact* case may a plaintiff attempt to demonstrate that a neutral rule has a greater effect on persons protected under Title VII than on a majority group. In contrast, "[p]roof of a discriminatory motive is critical" in a disparate treatment case. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (internal quotation marks omitted). By focusing on the effect of the policy—instead of the *intent* of UPS—petitioner and her *amici* attempt to resurrect a claim that the district court denied on procedural grounds. *See* Pet. App. 9a-10a &

n.6. This is reason alone to deny the petition. *See, e.g., Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (statement of Sotomayor, J., respecting the denial of the petition for writ of certiorari) (petitions should be denied where petitioner presents forfeited arguments).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondents

June 10, 2013

REPLY BRIEF

No. 12-1226

In The

Supreme Court Of The United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

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A. The Fourth Circuit's Decision Conflicts with the Text and Purpose of the PDA

As UPS acknowledges (Opp. 3-4), the company provides temporary accommodated work to three classes of drivers: (1) those who experience on-the-job injuries; (2) those who meet the Americans with Disabilities Act's (ADA's) definition of disability; and (3) those whose conditions render them ineligible for Department of Transportation (DOT) certification. But UPS does not provide temporary accommodated work to drivers who request it due to pregnancy. That disparity of treatment violates the plain text of the Pregnancy Discrimination Act (PDA), which provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). See Pet. 9-16.[1]

In response, UPS argues that it "treated petitioner in exactly the same way it treats all employees—regardless of pregnancy—who are unable to perform essential functions of the job as a result of an off-the-job injury or condition." Opp. 10. But that is neither true nor relevant. UPS treats pregnant employees *worse* than two significant categories of workers with "off-the-job injur[ies] or

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[1] Because UPS provided accommodated work to three sizeable classes of drivers who are similar to pregnant drivers in their ability to work, the company is incorrect to assert (Opp. 11) that Young's position would require liability whenever an employer "den[ies] some pregnant women benefits that are available to at least one person similar in her 'ability or inability to work.'"

condition[s]": those who have ADA disabilities and those whose conditions render them ineligible for DOT certification. See Pet. 4-5.[2] In any event, as the petition showed (Pet. 11-14), the PDA contains no exception for cases in which an employer has a "pregnancy-blind" reason for refusing to give a pregnant worker an accommodation that it has extended to a nonpregnant employee (*cf.* Opp. 10). The statute simply asks whether the pregnant employee has been "treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By granting accommodated work to nonpregnant employees, while denying it to pregnant workers like Young who are "as capable of doing their jobs as their male counterparts," *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991), UPS violated the plain text of the PDA.

UPS argues that our position "violates the 'cardinal rule' that 'a statute is to be read as a whole.'" Opp. 11 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Rather, it is UPS's and the Fourth Circuit's interpretation that violates that cardinal rule. UPS argues that "[r]ead as a whole, the PDA merely prohibits employers from using pregnancy as a criterion on which to grant or deny benefits." Opp. 12. But that interpretation reads the

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[2] UPS suggests (Opp. 29-30), that our argument on this point somehow seeks "to second-guess . . . erroneous factual findings." But our argument rests on clear facts in the summary judgment record, none of which were denied by the district court. See Pet. 4-5. Tellingly, UPS cannot point to a single "factual finding" made by the district court in its summary judgment decision that conflicts with the facts as the petition presents them.

PDA's second clause out of the statute. After all, the PDA's first clause, which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include * * * because of or on the basis of pregnancy," 42 U.S.C. § 2000e(k), *by itself* makes clear that employers may not use pregnancy as a criterion on which to grant or deny benefits. If that were all the PDA required, Congress would have had no need to include the second clause, with its "similar in their ability or inability to work" language. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").[3]

This Court has explained that "the second clause was intended to overrule the holding in [*General Electric Co. v.*] *Gilbert*[, 429 U.S. 125 (1976)]." *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 285 (1987). UPS's reading of the statute, which would permit employers to deny pregnant workers accommodations that are provided to nonpregnant employees who are similar in their ability to work so long as the employers did so pursuant to a "pregnancy-blind" policy, would not give effect to that intention. As the petition showed (Pet. 12-13), the disability insurance plan this Court upheld in *Gilbert* was "pregnancy-blind" in exactly the same way as UPS's accommodated-work policy was here. Under UPS's reading, the PDA would thus fail to achieve its acknowledged purpose of

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[3] As UPS notes (Opp. 12), this Court has said that "[t]he meaning of the [PDA's] first clause is not limited by the specific language in the second clause," *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 n.14 (1983), but it hardly follows that the second clause adds nothing to the first.

overturning *Gilbert*. Far from reading the PDA as a whole, the Fourth Circuit simply disregarded a key provision of the statute.

UPS points (Opp. 14) to three snippets of floor debates surrounding the PDA, snippets that it argues "specifically allow[] employers to treat pregnant employees the same as employees injured off the job." But those brief statements (less than a sentence each) could hardly trump the PDA's plain text or the statute's acknowledged purpose to overrule *Gilbert*. Nor do those statements purport to address the question of accommodated work for pregnant employees; they simply deny that the PDA requires employers to provide medical insurance or disability benefits to pregnant employees unless they provide them to other employees.[4]

The balance of the legislative history makes clear, as does the statutory text, that when employers provide accommodated work for some employees they must provide the same accommodations for pregnant women who are similar

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[4] *See* 123 Cong. Rec. 29,660 (1977) (Sen. Biden) ("First, the bill does not require employers to provide medical insurance or benefits for its employees. It simply requires that if coverage or benefits are given that disability due to pregnancy must be treated the same as any other non-work-related disability."); *id.* at 29,663 (Sen. Culver) ("The legislation before us today does not mandate compulsory disability coverage. Rather, it requires those employers who do provide disability coverage to treat pregnancy-related disabilities the same as any other nonwork related disability with regard to benefits and leave policies."); 124 Cong. Rec. 21,436 (1978) (Rep. Sarasin) ("[The PDA] would not require any coverage at all where no temporary disability, or sick leave, or health insurance plan is provided. It would not require extending coverage beyond job-related disability if that is all the existing coverage provides.").

in their ability to work. The House Report specifically explained that "[t]he 'same treatment'" required by the PDA "may include employer practices of transferring workers to lighter assignments," and that such practices must be "administered equally for all workers in terms of *their actual ability to perform work*." H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5 (1978) (emphasis added). The legislative history contains numerous similar statements.[5]

UPS argues (Opp. 15) that our position would provide "preferential treatment" to pregnant workers and "treat pregnancy more favorably than *any* other basis covered by Title VII." But requiring employers to provide pregnant workers the *same* temporary accommodations they provide similarly restricted nonpregnant workers is hardly preferential treatment. Rather, it is the *equal* treatment that the PDA demands. See Pet. 16. If the same standard

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[5] *See* S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977) ("treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work"); 123 Cong. Rec. 29,385 (1977) (Sen. Williams) ("The central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work."); *id.* at 29,387 (Sen. Javits) ("[T]he bill would prohibit as sex discrimination any personnel practice, fringe benefit program or other employment related action which treats pregnancy or pregnancy-related conditions differently than other conditions which also cause inability to work for limited periods. The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions."); *id.* at 29,662 (Sen. Cranston) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees—and when they are not able to work for medical reasons they must be accorded the same rights, leave privileges, and other benefits as other employees who are medically unable to work.").

does not apply to other bases covered by Title VII, that is because Congress limited the PDA's "shall be treated the same" language to cases involving "women affected by pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k).[6] Nor is there any basis for UPS's suggestion (Opp. 15) that our position would require broader accommodations for pregnant workers than the ADA provides for workers with disabilities. The ADA requires an employer to provide "reasonable accommodations" to a worker with a disability even if it does not accommodate any other employees. 42 U.S.C. § 12112(b)(5)(A). The PDA, read according to its plain text, requires an employer to accommodate pregnant workers only if, and to the extent that, the employer accommodates similarly restricted nonpregnant employees.

Finally, UPS is reduced to arguing (Opp. 13, 16-17) that Young's claim is barred by Section 703(h) of Title VII, which protects "bona fide seniority or merit system[s]." 42 U.S.C. § 2000e-2(h). UPS has waived that argument. Section 703(h)'s exemption is an affirmative defense that is waived if not specifically pleaded in the answer. *See* Fed. R. Civ. P. 8(c); *Jackson v. Seabord Coast Line R. Co.*, 678 F.2d 992, 1012-1013 (11th Cir. 1982). Yet although UPS's answer lists *twenty-six* purported defenses, it does not once assert that UPS's actions took place pursuant to a bona fide seniority or merit system. DCt. Dkt. 7. Nor did any of UPS's briefing below argue that the company's conduct was protected by Section 703(h)—or even that accommodating Young's

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[6] *AT&T Corp. v. Hulteen*, 556 U.S. 701, 709 n.3 (2009), which did not involve the PDA's "shall be treated the same" language, is inapposite. *Cf.* Opp. 15-16.

pregnancy would violate (as opposed to simply not being provided for by) the company's seniority system. Because UPS waived the issue in the district court, and it was neither raised in nor decided by either of the lower courts, the company may not raise it for the first time here. *See Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998).

Had UPS raised the issue, Young would have had powerful responses.[7] Section 703(h) protects some seniority systems that freeze into place the effects of past discrimination. But it does not protect employers where fresh discrimination is written into the terms of the seniority system itself. In *Hulteen*, for example, this Court concluded that the employer was protected by Section 703(h) when it "pa[id] pension benefits calculated in part under an accrual rule, *applied only prior to the PDA*, that gave less retirement credit for pregnancy leave than for medical leave generally." 556 U.S. at 704 (emphasis added). But the Court made clear that it was only because the accrual rule was "a permissible differentiation given the [pre-PDA] law at the time" that the rule complied with "the subsection (h) bona fide requirement." *Id.* at 712. To the extent that

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[7] Young would have also been able to develop fact-based responses, particularly given Young's relatively high seniority; a UPS manager's testimony that temporary alternative work "typically" does not "displac[e] someone," DCt. Dkt. 76 Att. 20 at 17; the CBA provision requiring the company to grant "[a] light duty request, certified in writing by a physician, * * * in compliance with federal and state laws," *id.*, Att. 27, at 5; and the array of circumstances other than pregnancy in which the company provides accommodated work. *See US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002) ("The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.").

UPS's seniority system denies accommodated work to pregnant women while granting it to "persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), it works a fresh violation of the PDA and is not protected by Section 703(h).

B. There is Acknowledged Disagreement in the Circuits

As the petition explained (Pet. 16-17 n.6), commentators have noted a longstanding division in the lower courts regarding the question presented. Although the Fourth Circuit's decision is consistent with the law in the Fifth, Seventh, and Eleventh Circuits,[8] the Fourth Circuit felt "compelled to disagree" (Pet. App. 23a) with the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). The Fourth Circuit's decision is also inconsistent with the Tenth Circuit's decision in *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000).

UPS argues (Opp. 23) that the Sixth Circuit's subsequent decision in *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006), "limited *Ensley-Gaines* to its facts." Not so. As the petition noted (Pet. 18 n.7), *Reeves* read *Ensley-Gaines* as "primarily deal[ing] with whether a prima facie case had been established." *Reeves*, 446 F.3d at 641 n.1. Even limited to that context, *Ensley-Gaines* conflicts with the Fourth Circuit's decision here. The Fourth Circuit, after all, rejected Young's claim precisely

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[8] UPS argues (Opp. 22), that decisions of the Third and Eighth Circuits also accord with that of the Fourth Circuit. But the company acknowledges that those circuits "have not squarely considered and decided the issue." *Id.*

because it concluded that Young had failed to make out a prima facie case. Pet. App. 25a-29a.

Contrary to UPS's statement that "petitioner's claim failed at the pretext stage" (Opp. 27), the Fourth Circuit never reached the pretext question.[9] As the Fourth Circuit acknowledged (Pet. App. 23a), its decision therefore conflicted with *Ensley-Gaines*. It was also inconsistent with the Tenth Circuit's decision in *Horizon/CMS*, 220 F.3d at 1195 n.7, which said that "[e]vidence that pregnant women were treated differently from other temporarily-disabled employees" is sufficient at the prima facie stage.

C. This Case is an Ideal Vehicle

UPS argues that, after the passage of the ADA Amendments Act (ADAAA), "the scenario in this case may never be repeated." Opp. 29. To the contrary, the ADAAA does not require accommodation of the physical limitations that attend an ordinary pregnancy. Although the ADAAA broadens the ADA's definition of disability, it retains the requirement that the condition constitute an "impairment." *See* 42 U.S.C. § 12102(1). Pregnancy is not an "impairment." *See* 29 C.F.R. Pt. 1630 App. § 1630.2(h) ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are

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[9] Nor is it true that Young "presented no plausible evidence" of pretext (Opp. 28), such that the Fourth Circuit would have been required to uphold summary judgment even if it had reached the question. Evidence of pretext included the many non-pregnancy situations in which UPS accommodates out-of-work injuries (Pet. 4-5), as well as the statement of Young's division manager that "she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant'" (Pet. App. 8a).

also not impairments."). Accordingly, employers need not accommodate an ordinary pregnancy, unaccompanied by an additional impairment (such as preeclampsia), under the ADAAA.

Far from diminishing the significance of this case, the ADAAA underscores it. The Fourth Circuit held that workers who receive ADA accommodations are not a proper comparison class under the PDA. Pet. App. 27a. Prior to the ADAAA's enactment, employers might have voluntarily accommodated many workers who now come within the statute's expanded coverage. If the Fourth Circuit's ruling is allowed to stand, the ADAAA's broadening of the ADA's accommodation requirement will come at the direct expense of pregnant women like Young—a result that conflicts with the text and purpose of the PDA. *See* Amicus Br. 11-14.

UPS makes a labored argument (Opp. 30-33) that Young somehow forfeited the question presented by raising only a disparate treatment, and not a disparate impact, claim below. That is nonsense. Young's claim has always been that, because UPS provides accommodated work to individuals who experience on-the-job injuries, ADA-qualifying disabilities, or conditions that render them ineligible for DOT certification—but not to individuals who request accommodations due to pregnancy—pregnant women are not "treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). As the statute's use of the phrase "treated the same" makes clear, that claim sounds in disparate treatment. And, as we have shown, it finds support in the text and purpose of the PDA.

In any event, UPS's argument places undue weight on the label to be attached to Young's claim. Whether that claim is labeled a disparate treatment claim, one arising directly under the PDA's second clause, or something else, the question presented in the petition for certiorari is precisely the same question Young has raised throughout this case—and the question actually decided by the court of appeals. See Pet. App. 16a; CA Opening Br. 43-52; DCt. Dkt. 76-1 at 29-30, 34-36. Accordingly, it cannot have been forfeited.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

JUNE 12, 2013

AMICUS CURIAE BRIEF

No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOCELYN SAMUELS
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DENNIS J. DIMSEY
HOLLY A. THOMAS
BONNIE I. ROBIN-VERGEER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." The question presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work."

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In the Supreme Court of the United States

No. 12-1226

PEGGY YOUNG, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, makes it unlawful for an employer to, *inter alia*, discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[] because of such individual's * * * sex." 42 U.S.C. 2000c-2(a). In 1976, this Court held that an employer's exclusion of pregnancy from coverage under a disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 135-140. In 1978, Congress overruled that holding by enacting the Pregnancy Discrimination Act

(PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076. See *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 670 (1983). The PDA amended Title VII by adding the following subsection to the Act's "Definitions" section:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. 2000e(k).

2. In 1999, petitioner began working for respondent United Postal Service. Pet. App. 4a. In 2002, petitioner started driving a delivery truck for respondent, and by 2006, she was working as a part-time early-morning driver (also known as an "air driver"). *Ibid.* Her responsibilities included early-morning pick-up and delivery of packages that had arrived by air carrier the previous night. *Ibid.* She and other

drivers met a shuttle from the airport, transferred packages to their vans, and delivered the packages. *Id.* at 5a, 31a-33a. Respondent required air drivers such as petitioner to be able to "lift, lower, push, pull, leverage and manipulate" items "weighing up to 70 pounds" that were not oddly shaped. *Id.* at 3a, 31a-33a.

In July 2006, petitioner was granted a leave of absence from work in order to pursue in vitro fertilization treatments. Pet. App. 5a. Petitioner sought to extend her leave after becoming pregnant. *Ibid.* In September 2006, before she was ready to return to work, petitioner provided her supervisor with a physician's note indicating that petitioner "should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter." *Ibid.* During a follow-up phone call, petitioner's supervisor told her that respondent's policy would not permit petitioner to return to work while she had a 20-pound lifting restriction. *Ibid.* Petitioner protested that she was rarely called upon to lift more than 20 pounds in her role as an air driver. *Ibid.* In October 2006, petitioner obtained a note from a midwife confirming that petitioner should not lift more than 20 pounds. *Id.* at 5a-6a.

Petitioner later contacted her supervisor and requested to return to work. Pet. App. 6a. She was referred to respondent's occupational health manager (Carol Martin), who determined that petitioner was unable to perform the essential functions of her job and was ineligible for a light-duty assignment. *Id.* at 5a-6a. Pursuant to respondent's internal policies and the applicable collective bargaining agreement (CBA), respondent offered light-duty work assignments (on a

temporary or permanent basis) only to (1) employees who were injured on the job; (2) employees who were eligible for accommodations under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*; and (3) drivers who had lost their Department of Transportation (DOT) certification because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. Pet. App. 3a-4a, 6a-7a. Martin explained to petitioner that respondent did not offer such accommodations to employees with pregnancy-related limitations. *Id.* at 7a.

In November 2006, petitioner approached her Division Manager and explained her desire to return to work. Pet. App. 7a-8a. The manager told petitioner that she was "too much of a liability" while pregnant and that she could not come back into the building until she was no longer pregnant. *Id.* at 8a (citation omitted). When petitioner's leave expired later that month, she took an extended leave of absence without pay and ultimately lost her medical coverage. *Ibid.* She returned to work for respondent after giving birth in April 2007. *Ibid.*

3. In July 2007, petitioner filed a charge with the United States Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of race,[1] sex, and pregnancy. Pet. App. 8a. After the EEOC issued a right to sue letter, petitioner filed suit seeking damages for intentional race and sex discrimination under Title VII and for disability discrimination under the ADA. *Id.* at 8a-9a. In February 2011,

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[1] Petitioner, who is white, alleged that respondent permitted pregnant African-American employees to work. Pet. App. 8a n.4.

the district court granted summary judgment to respondent. *Id.* at 9a-10a, 30a-83a.[2]

With respect to petitioner's PDA (sex discrimination) claim, the district court concluded first that petitioner had not provided any direct evidence of discrimination. Pet. App. 51a-57a. In particular, the district court concluded that respondent's policy of providing assignment accommodations only to limited groups of employees was not facially discriminatory because respondent identified those groups without reference to gender. *Id.* at 55a-57a. The court then held that petitioner had not established a prima facie case of discrimination because she had not identified similarly situated employees who were treated more favorably than she. *Id.* at 57a-62a. Finally, the district court held that, even if petitioner had established a prima facie case, she had not demonstrated that respondent's proffered nondiscriminatory reason for not allowing her to return to work (*i.e.*, that she could not perform the essential duties of the job of air driver) was pretextual. *Id.* at 62a-63a.

4. The court of appeals affirmed. Pet. App. 1a-29a.

First, the court agreed with the district court that petitioner had not presented any direct evidence of

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[2] The district court granted summary judgment to respondent on petitioner's race-discrimination claim and petitioner did not appeal that ruling. Pet. App. 9a n.5, 63a-66a. The district court also granted summary judgment to respondent on petitioner's disability-discrimination claim. *Id.* at 9a, 66a-77a. The court of appeals affirmed that ruling, *id.* at 11a-16a, and petitioner does not challenge that holding in her petition for a writ of certiorari. In addition, the court of appeals upheld the district court's denial of petitioner's motion to amend her complaint to include a disparate-impact claim, *id.* at 10a n.6, and petitioner does not challenge that holding in her petition.

sex discrimination because respondent's policy of "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification" is "pregnancy-blind." *Id.* at 18a; see *id.* at 17a-24a. The court of appeals rejected petitioner's argument that, as amended by the PDA, Title VII requires employers to treat pregnant workers as favorably as it treats non-pregnant workers who are similar in their ability to work, even when the employer does not provide the same favorable treatment to *all* nonpregnant employees who are similar in their ability to work. *Id.* at 18a-24a. The court acknowledged that Title VII provides that "women affected by pregnancy, child-birth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability to work." *Id.* at 19a-20a (quoting 42 U.S.C. 2000e(k)). In spite of what the court viewed as the "unambiguous" language of that statutory text, the court concluded that that language "does not create a distinct and independent cause of action" and does not require that pregnancy "be treated more favorably than any other basis." *Id.* at 20a-21a.

Second, the court of appeals agreed with the district court that petitioner failed to establish a prima facie case of discrimination under the burden-shifting analysis established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 25a-29a. Under that framework, the court explained, a plaintiff must show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more

favorable treatment." *Id.* at 25a-26a (quoting *Gerner* v. *County of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2004)). The court of appeals concluded that petitioner had made the first three required showings, but had failed to raise a genuine issue of fact as to whether similarly-situated employees outside her protected class received more favorable treatment. *Id.* at 26a-29a. The court reasoned that a pregnant worker subject to a temporary lifting restriction is not "similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. The court explained that petitioner was dissimilar to an employee entitled to an ADA accommodation because petitioner's "lifting limitation was temporary." *Ibid.* The court further explained that petitioner was not similar to those who had lost DOT certification both because "no legal obstacle stands between [petitioner] and her work," and because those individuals "maintained the ability to perform any number of demanding physical tasks." *Id.* at 27a-28a (citation omitted). Finally, the court explained that petitioner "is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a. The court ultimately concluded that, because petitioner had not "establish[ed] that similarly situated employees received more favorable treatment than she did," she had failed to "establish the fourth element of the prima facie case for pregnancy discrimination." *Id.* at 29a.

DISCUSSION

A majority of the courts of appeals (including the court of appeals in this case) to have considered claims similar to petitioner's have erred in interpreting Title VII's requirement that employers treat employees with pregnancy-related limitations as favorably as nonpregnant employees who are similar in their ability or inability to work. Although the question presented is important and recurring, review is not warranted at this time because Congress's enactment of the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553, may lead courts to reconsider their approach to evaluating a pregnant employee's claim that other employees with similar limitations on their ability to work were treated more favorably than she and may diminish the adverse effect of the courts of appeals' error. Further, the EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA. The publication of such guidance should clarify the Commission's interpretation of those statutes with respect to policies like the one at issue in this case, thus diminishing the need for this Court's review of the question presented.

A. The Court Of Appeals Erred In Concluding That Petitioner Failed To Establish A Prima Facie Case Of Sex Discrimination Under the *McDonnell Douglas* Framework Applied in Many Title VII Cases

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's policy of excluding pregnancy from its disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *Id.* at 135-140. Two years later, Congress

legislatively overruled that interpretation of Title VII when it enacted the PDA. See, *e.g.*, *AT&T* v. *Hulteen*, 556 U.S. 701, 705 (2009); *California Fed. Savs. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 276-277 (1987); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983). The PDA added Subsection (k) to Title VII's "Definitions" provision, 42 U.S.C. 2000e. Subsection (k) provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. 2000e(k).

The first quoted clause prohibits employers from treating any employee less favorably on the basis of pregnancy, childbirth, or related medical conditions—it makes clear that such a distinction is discrimination on the basis of sex. The second clause "explains the application of th[at] general principle to women employees," *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678 n.14, by specifying the appropriate comparator for determining whether an employer's differential treatment of an employee is based on pregnancy, childbirth, or a related medical condition (*i.e.*, is based on sex). Congress thus directed that "women affected by pregnancy, childbirth, or related

medical conditions" (hereinafter referred to as "pregnant women" or "pregnant employees") "shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

In a typical Title VII sex-discrimination case, a female employee establishes a prima facie case by demonstrating that (1) she is a woman, (2) she is qualified for the job or job benefit she seeks, (3) she did not obtain the job or job benefit she seeks, and (4) a similarly-situated man did receive the job or job benefit. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). When a sex-discrimination claim is based on pregnancy, the statute directs that the fourth prong should focus on the relative treatment of employees who are similar in their ability or inability to work instead of on the relative treatment of men. Shifting the focus of the analysis to an employee's ability to work was one of the principle purposes of the PDA. See, *e.g.*, S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (*Senate Report*); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 (1978). As this Court has explained, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated in their ability or inability to work." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 204-205 (1991) (brackets in original) (quoting *Guerra*, 479 U.S. at 297 (White, J., dissenting)). "[T]his statutory standard," the Court noted, "was chosen to protect female workers from being treated differently from other employees simply because of their capacity to

bear children." *Id.* at 205. Title VII's prohibition on sex discrimination therefore requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Id.* at 204 (quoting 42 U.S.C. 2000e(k)).

Petitioner argues (see Pet. 11-16) that the statutory language and this Court's reading of it in *Johnson Controls* means that a plaintiff can prove disparate treatment directly (*i.e.*, without use of the *McDonnell Douglas* burden-shifting inferences) by simply establishing that non-pregnant employees who are similar in their ability or inability to work are treated more favorably. Thus far, most courts have instead analyzed such claims under the conventional *McDonnell Douglas* framework for proving disparate treatment. In this case, the lower courts erred in their application of that framework.

2. a. The court of appeals erred in holding that petitioner failed to establish a prima facie case of pregnancy-related sex discrimination under the *McDonnell Douglas* framework. Although the court acknowledged that the meaning of the Section 2000e(k)'s second clause was "unambiguous," Pet. App. 20a (quoting *Johnson Controls, Inc.*, 499 U.S. at 204-250), it nevertheless held that the PDA does not prohibit an employer from treating a pregnant employee less favorably than it treats at least some nonpregnant employees who are similar in their ability to work, *id.* at 20a-24a. In the court of appeals' view, respondent is not required to accommodate petitioner's temporary lifting restriction even though it would accommodate a nonpregnant employee's identical lifting restriction if the restriction arose

from an on-the-job injury. *Id.* at 22a. The source of each employee's limitation, the court of appeals reasoned, renders them dissimilar in their ability or inability to work. *Id.* at 22a, 27a-28a. As a result, the court concluded, such a policy does not discriminate on the basis of sex because it "treats pregnant workers and nonpregnant workers alike." *Id.* at 23a. And because such a policy is "pregnancy-blind," the court of appeals held that petitioner could not rely on the more favorable treatment afforded to nonpregnant workers with temporary lifting restrictions that result from on-the-job injuries to establish a prima facie case. *Id.* at 27a. That reasoning is incorrect.

As discussed, Section 2000e(k) requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Johnson Controls, Inc.*, 499 U.S. at 204 (quoting 42 U.S.C. 2000e(k)). Nothing in the PDA indicates that a pregnant employee faces discrimination within the meaning of Title VII *only* when she receives less favorable treatment than *every* other employee who is similar in his or her ability or inability to work. If a pregnant employee can identify a category of nonpregnant employees who are similar in their ability to work and who are treated more favorably, that is sufficient to establish a prima facie case of pregnancy-based sex discrimination under Title VII. The same is true with respect to discrimination claims more generally under Title VII. If a female job applicant alleges discrimination in hiring on the basis of sex, an employer may not defeat that allegation merely by pointing out that some men also were not hired for a particular job. Under the statute's plain text,

petitioner's allegation that a group of nonpregnant employees similar in their ability to work were accommodated is sufficient to satisfy the fourth prong of the prima facie case even though other nonpregnant employees similar in their ability to work were not accommodated.

In enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations. Congress distinguished among employees based on the work-related *effect* of their work limitations. Title VII does not require employers to treat all employees with similar work-related limitations the same; but a pregnant employee establishes a prima facie case of discrimination when she establishes that an employer treats pregnant employees with work limitations less favorably than it treats at least some nonpregnant employees with similar limitations. The court of appeals rejected that interpretation of Title VII because it would require employers to treat pregnancy "more favorably than any other basis." Pet. App. 21a. It is true that pregnancy is afforded more protection than many other characteristics of employees. The same can be said of race, sex (unrelated to pregnancy), religion, and national origin, all of which are protected by Title VII while other characteristics are not. That extra protection is not an "anomal[y]," *ibid.*; it is the point of the statute. The court of appeals elsewhere recognized that respondent's CBA "places a heightened obligation on [respondent] to accommodate" employees injured on the job. *Id.* at 28a. Title VII places the same "heightened obligation" on respondent to offer the same accommodation

to pregnant employees who are similar in their ability or inability to work.[3]

b. Based on the allegations in this case, the court of appeals erred in concluding that petitioner failed to establish a prima facie case. Petitioner identified three categories of employees she viewed as similar to her in their ability to work: employees injured on the job, employees entitled to accommodations under the version of the ADA applicable at the time, and drivers who had temporarily lost their DOT certification and therefore required a non-driving job. Pet. App. 27a. The court of appeals concluded that none of the employees in those categories was similar to petitioner in his or her ability or inability to work. *Id.* at 27a-28a.

As discussed, the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries because the source of the employee's injury is not relevant at the prima facie case stage. See pp. 11-13, *supra*. Both sets of employees are similarly situated with respect to their "ability or inability to work."

A different analysis applies to the employees respondent accommodates pursuant to the ADA. Under the version of the ADA applicable to this case, employees with temporary impairments were generally not considered to be individuals with disabilities under that statute and thus were not entitled to accommodations. But cf. pp. 20-21, *infra* (discussing amendments to the ADA). The court of appeals may have been

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[3] Because a policy that treats employees with limitations resulting from on-the-job injuries more favorably than employees with comparable limitations resulting from pregnancy presents a prima facie case of discrimination, an employer cannot rebut such a prima facie case merely by pointing to the existence of the policy.

correct, therefore, that employees who were entitled to accommodations under the applicable version of the ADA (*i.e.*, employees who generally had longer-term or more severe impairments) were not similar to petitioner in their ability to work.

Finally, it appears that the courts below erred in finding no genuine issue of material fact about whether drivers who lose their DOT certifications are similar to petitioner in their ability to work. Some drivers in that category lose their certification due to injuries (sustained on or off the job). Pet. App. 36a. Those drivers may well be similar to petitioner if their injuries impose lifting restrictions. Other drivers may lose their DOT certification as a result of losing their driver's license. *Ibid.* Those drivers may not be similarly situated in their ability to work—although they will require (and respondent will offer them) an "inside job" accommodation, they presumably can take jobs that require heavy lifting. Given the uncertainty about the range of ability to work within that category, the courts below should not have granted (and affirmed the grant of) summary judgment to respondent on the question whether those employees are proper comparators to pregnant employees such as petitioner.

c. Recognizing that petitioner has established a prima facie violation of the PDA under the circumstances here is consistent with the longstanding position of the EEOC. This Court has held that the Commission's reasoned interpretations of Title VII are entitled to a "measure of respect" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (citation omitted).

In 1979, the EEOC published guidance on the PDA in the form of questions and answers. 29 C.F.R. Pt. 1604 App. (44 Fed. Reg. 23,805 (Apr. 20, 1979)). In response to a question about an employer's duty to accommodate an employee's pregnancy-related inability to perform the functions of her job, the EEOC stated: "An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees." 29 C.F.R. Pt. 1604, App. ¶ 5. The Commission explained that, "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Ibid.* Nothing in those guidelines indicates that an employer's duty to accommodate a temporary restriction is dependent on the employer's offering an accommodation to *every* nonpregnant employee with a similar restriction. See also *EEOC Enforcement Guidance: Unlawful Disparate Treatment Of Workers With Caregiving Responsibilities* II.B (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html#pregnancy ("An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy."); *Employer Best Practices for Workers with Caregiving Responsibilities*, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified Jan. 19, 2011) (listing as a prohibited practice "providing reasonable accommodations for temporary medical conditions but not for pregnancy"). The Commission has also explained in

litigation that a pregnant employee is "most appropriately compared to all temporarily-disabled, non-pregnant employees whether they sustained their injuries on or off the job." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194-1195 (10th Cir. 2000). When enacting the PDA, Congress relied on the Commission's pre-*Gilbert* guidelines, which "specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities." *Senate Report* 2.

3. As petitioner notes (Pet. 20), the court of appeals' erroneous holding—*i.e.*, that an employer's accommodation of temporary limitations arising from on-the-job injuries but not similar limitations related to pregnancy raises no suggestion of discrimination under the PDA—is consistent with the interpretations of the Fifth, Seventh, and Eleventh Circuits. See *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548 (7th Cir. 2011); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1311-1313 (11th Cir. 1999); *Urbano* v. *Continental Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir.), cert. denied, 525 U.S. 1000 (1998). Petitioner argues (Pet. 16-19) that the decisions of those courts conflict with decisions of the Sixth and Tenth Circuits; respondent contends (Br. in Opp. 20, 22-29) that any disagreement between the decision below and decisions of the Sixth and Tenth Circuits is either nonexistent or inconsequential. Although the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case, it appears that petitioner's claim would not have fared any better in those circuits because they, too, would likely hold that

an employer may accommodate on-the-job injuries without accommodating pregnancy-related limitations, at least absent other evidence of animus or any suggestion that the policy was not applied uniformly.

In contrast to the Fourth Circuit's decision in this case, the Sixth Circuit in *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (1996), held that an employee with pregnancy-related physical limitations had established a prima facie case of pregnancy-related sex discrimination when she established that her employer offered light-duty accommodations to employees whose temporary limitations resulted from on-the-job injuries but not to pregnant employees with similar temporary limitations. *Id.* at 1226. The Sixth Circuit did not consider in that case whether the plaintiff should ultimately prevail because it found genuine issues of material fact as to whether the defendant had established a legitimate nondiscriminatory reason for the differential treatment. In later cases raising materially identical factual claims, the Sixth Circuit has adhered to the *Ensley-Gaines* view with respect to the prima facie case. See *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 & n.1 (2006); see also *Latowski* v. *Northwoods Nursing Ctr.*, 549 Fed. Appx. 478, 483-484 & n.3 (2013). In *Reeves*, however, the court held that the employer's distinction between pregnancy-related limitations on ability to work and similar limitations arising from on-the-job injuries did not violate Title VII. 446 F.3d at 640-643. The court relied on the reasoning of the Fifth and Eleventh Circuits in *Urbano* and *Spivey*, *supra*, concluding that the employer's differential treatment was not pregnancy-based. *Reeves*, 446 F.3d at 642-643. The panel reasoned that holding otherwise would require employers

to provide "preferential, not equal treatment" to pregnant employees, a result that "finds no support in the Act." *Ibid.* In *Latowski*, the panel also held that the employer's on-the-job/off-the-job distinction was a legitimate nondiscriminatory basis for treating pregnancy-related limitations less favorably, but remanded for resolution of a factual question about whether that basis was pretextual on the facts of that case. 549 Fed. Appx. at 478-484.

Similarly, the Tenth Circuit in *Horizon/CMS Healthcare Corp.*, *supra*, held that the EEOC had established a prima facie case of pregnancy-related sex discrimination by establishing that non-pregnant employees who sustained off-the-job injuries were treated more favorably than pregnant employees. 220 F.3d at 1195-1196. The Commission conceded in that case that the employer met its burden of articulating a facially nondiscriminatory reason for its denial of light-duty accommodations to pregnant employees—by stating that light-duty positions were available only to those suffering on-the-job injuries—but argued that the employer in that case did not apply the policy as described. *Id.* at 1197. The Tenth Circuit remanded the case for resolution of factual questions about whether the justification was pretextual. *Id.* at 1197-1200.

Thus, plaintiff's claim apparently would not fare any better in the Sixth Circuit than it did in the Fourth (or would in the Fifth, Seventh, or Eleventh) and it is unclear whether she could ultimately prevail in the Tenth Circuit. Although the Sixth and Tenth Circuits would likely agree with petitioner that the proper comparator at the fourth step of the prima facie case includes employees with temporary physical

limitations resulting from on-the-job injuries, at least the Sixth Circuit likely would not agree with petitioner that such a distinction runs afoul of the PDA.

B. The Question Presented Does Not Warrant Review At This Time

Because petitioner would be unlikely to prevail in the circuits that have considered claims like hers, this case is not a strong candidate for certiorari review. Even so, review by this Court of the question presented might be warranted at some point. In our view, most of the courts of appeals to have considered this issue have erred in interpreting the PDA by ignoring the textual requirement that a court compare pregnant employees to other employees "not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k). Moreover, the question presented is important to many women in the workplace and to their families.

Nevertheless, review of the question presented is not warranted at this time in light of the recent enactment of the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, which took effect after the events at issue in this case and does not apply retroactively. In relevant part, the ADAAA and its implementing regulations expanded the definition of disability under the ADA to cover a broader scope of impairments. See 29 C.F.R. 1630.2(j)(1)(ix). The ADAAA also clarified that impairments that substantially limit an individual's ability to lift, stand, or bend are disabilities under the ADA. 42 U.S.C. 12102(2)(A); 29 C.F.R. 1630.2(i)(1)(i).

Those amendments may have the effect of diminishing the importance of the erroneous interpretations of Title VII adopted by several courts of appeals for

two reasons. First, although pregnancy in and of itself will not qualify as a disability, the amended ADA may require employers to accommodate pregnant women who are substantially limited in a major life activity as a result of a pregnancy-related impairment. If so, such women would not need to rely on the protection afforded by Title VII; their right to an accommodation would not depend on their employer's offering a similar accommodation to nonpregnant employees with similar impairments. Second, as amended by the ADAAA, the ADA requires employers to accommodate at least some employees with *temporary* restrictions on their ability to lift or stand even when the limitations arise from non-work-related causes. The courts of appeals thus will have to consider whether employees covered by the amended ADA provide a suitable comparator at the fourth stage of a Title VII prima facie case even under the flawed reasoning employed in the Fourth, Fifth, Seventh, and Eleventh Circuits. In light of the possibility that the courts of appeals will expand the coverage of the PDA or that the ill effect on pregnant women in the workforce of their current erroneous view will diminish in light of the availability of relief under the amended ADA, this Court's review of the question presented is not warranted at this time.

Finally, as noted at p. 8, *supra*, the EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA. The publication of such guidance should clarify the Commission's interpretation of those statutes with respect to policies like the one at

issue in this case, thus diminishing the need for this Court's review of the question presented at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOCELYN SAMUELS
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DENNIS J. DIMSEY
HOLLY A. THOMAS
BONNIE I. ROBIN-VERGEER
Attorneys

MAY 2014

AMICUS CURIAE BRIEF

No. 12-1226

In The Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LAW PROFESSORS AND WOMEN'S RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHELLE CAIOLA
Senior Staff Attorney
LEGAL MOMENTUM
395 Hudson Street
New York, NY 10014
(212) 925-6635

JOANNA L. GROSSMAN
Counsel of Record
Sidney & Walter Siben
Distinguished Professor
of Family Law
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, NY 11549
(516) 463-5241
lawjlg@hofstra.edu

DEBORAH L. BRAKE
Professor of Law
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 648-2655

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors and women's rights organizations who share expertise in pregnancy discrimination and a longstanding commitment to civil rights and equality in the workplace for all Americans. Their interest in this case is in ensuring that the Pregnancy Discrimination Act is given its intended meaning. Statements of interest for the organizations and a list of individual signatories may be found in Appendix A.

SUMMARY OF ARGUMENT

The petition in this case presents an issue of great significance for working women in the United States, who comprise nearly half the labor force. The vast majority of working women will become pregnant at some point during their working lives, and many of them will experience at least minor conflicts between job requirements or working conditions and the temporary, but real physical effects of pregnancy.

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent received timely notice of *amici's* intent to file this brief and have consented to its filing in letters submitted with the filing of this brief.

The Fourth Circuit's ruling interprets the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), in a manner that is inconsistent with the statutory text, Congress' intent in passing the law, and this Court's post-PDA precedents. The ruling, instead, reverts back to a pre-PDA approach, in which pregnancy is in a class by itself, and pregnant working women are excluded from benefits and accommodations available to others. The Fourth Circuit's ruling is premised on three critical mistakes. First, the court searches for pretext – and upholds United Parcel Service's ("UPS") policy when it finds no evidence of animus – despite a clear facial violation of the statutory command to extend accommodations to pregnant women who need them if they are extended to employees with other conditions similarly affecting their ability to work. Second, the court reads the second clause out of the PDA, despite clear precedents from this Court that explain its meaning and proper application. Third, by applying its mistaken view of the second clause, the court strips pregnant women of most potential comparators, rendering the comparative right of accommodation an empty vessel.

Indeed, in light of recent amendments to the ADA expanding the pool of employees entitled to reasonable accommodation to include those with temporary conditions analogous to pregnancy, the Fourth Circuit's approach, if left standing, will exponentially widen the gulf in employment opportunities between pregnant women and others "similar in their ability or inability to work." *See* 42 U.S.C. § 2000e(k).

Beyond simply failing to give the PDA its due, the Fourth Circuit's ruling exacerbates existing harmful stereotypes about pregnant workers, one of the primary problems the PDA was intended to counteract. The lower court's reasoning and approach traffic in the notion that pregnancy is a unique liability undeserving of accommodation and reinforce a gender ideology that is incompatible with women's full participation in the labor force.

Moreover, the women most in need of the PDA's protection are most harmed by the ruling below. The persistence of pregnancy discrimination in the workplace is well documented, but it is women in low-wage jobs and traditionally male-dominated occupations who are most likely to experience temporary conflicts between the physical effects of pregnancy and job requirements. The Fourth Circuit's misunderstanding of the PDA's second clause will create profound economic instability for such women and their families and lead to the well-known obstacles to re-entry if they lose their jobs.

In sum, the Fourth Circuit's ruling adopts a view of pregnancy discrimination that belies both the text and intent of the PDA, reinforces stereotypes about the incompatibility of pregnancy with paid employment, and undermines this Court's longstanding commitment to gender equality and the "equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

For these reasons, we urge the Court to review the decision of the Fourth Circuit and settle the longstanding circuit split about the proper interpretation of the PDA's second clause.

ARGUMENT

I. The Fourth Circuit's Decision Marks a Return to Precedents Purposely Superseded by Congress when it Passed the PDA.

The PDA was passed to overturn this Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125, 128 (1976), which held that pregnancy discrimination was not a form of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In *Gilbert*, this Court upheld an employer's policy that denied disability benefits during pregnancy leave while granting them for other types of temporary leave. The Court adopted the formalistic reasoning of *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (holding that the exclusion of pregnancy from a comprehensive disability insurance program did not violate the Equal Protection Clause), and refused to recognize that the exclusion of pregnancy, a condition only affecting women, discriminates on the basis of sex.

In enacting the PDA, Congress recognized that employer responses to pregnancy have hindered women's opportunities in the workplace. As Justice

Ginsburg has observed, "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens." *AT&T Corp. v. Hulteen*, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting). *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (striking down school board rule forcing pregnant teachers to take unpaid leave after the fourth month of pregnancy); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Georgetown L.J. 567, 595-600 (2010) (discussing exclusionary policies and practices). Congress responded to this history with specific directives designed to eliminate the most common and most damaging types of policies and practices for pregnant working women. The PDA's primary goal was to "enable women to maintain labor-force attachments throughout pregnancy and childbirth." Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 484 (2011).

The PDA established two forms of protection against discrimination for pregnant working women. The first clause of the Act redefined sex discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). This clause unambiguously overturned *Gilbert*, *see Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S.

669, 678 (1983), and eliminated a wide range of employment policies that openly discriminated against pregnant workers or based employment decisions on stereotyped assumptions about their capacity to work.

The second clause of the Act provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e(k). The second clause is unique in Title VII. To remedy a longstanding problem of employer policies that treated pregnancy as a *sui generis* characteristic and excluded pregnant women from receiving otherwise generally available benefits, Congress created a comparison group for pregnant women – employees "similar in their ability or inability to work" – and directed that the two groups be treated "the same for all employment-related purposes." 42 U.S.C. § 2000e(k). As the House Report on the PDA explains, the second clause provides the only appropriate point of comparison for pregnant and comparably disabled workers: "their actual ability to perform work." H.R. Rep. No. 95-948, at 5 (1978); *see also* Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4 (1977) ("Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to

work must be permitted to work on the same conditions as other employees.").

The ruling below ignores this Court's interpretations of the PDA, the plain text of the statute, and Congress' intent. The Fourth Circuit's opinion upheld UPS's policy, which offers light-duty work to three categories of employees – those injured on the job, those entitled to accommodations under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2006) ("ADA"), and those who have lost Department of Transportation certification due to legal impediments like a lost license or physical impediments regardless of the underlying cause – but denies it to employees, like Peggy Young, who have a temporary lifting restriction due to pregnancy. *See* Pet. App. 3a-4a.

The Fourth Circuit's ruling makes three critical mistakes and violates the PDA's core command that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *UAW v. Johnson Controls*, 499 U.S. 187, 204 (1991).

First, when evaluating the legality of UPS's failure to accommodate Peggy Young's pregnancy-related restriction, the court below erroneously applied the pretext analysis from *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). The PDA's second clause requires employers to grant pregnant women

accommodations necessitated by the physical effects of pregnancy *if they grant them to similarly situated employees*. UPS's admission that it accommodates multiple categories of employees, while refusing to accommodate pregnant women, establishes a formal policy of discrimination. The burden is not on the petitioner to establish that UPS's reason for the disparate treatment is the product of animus or bias. The formal disparate treatment speaks for itself. As the Sixth Circuit explained in *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996), while employees pursuing Title VII claims generally must establish that they are similarly situated in all respects to potential comparators, "the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases" and "requires only that the employee be similar in his or her 'ability or inability to work.'" *See also* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J. L. & Feminism 15, 36-41 (2009) (discussing cases). Congress dictated the appropriate comparison group: the PDA requires employers to focus on the extent of incapacity alone.

Second, despite a warning from this Court in *Johnson Controls*, 499 U.S. at 205, not to "read the second clause out of the Act," the ruling below does just that. Conceding that "[s]tanding alone, the second clause's plain language is unambiguous," the lower court concludes that its juxtaposition with the first clause creates "confusion" and "potential

incongruence." Pet App. 20a-21a. It then resolves its straw-man conflict by taking the draconian step of rendering the second clause meaningless. The ruling below asserts that the second clause "does not create a distinct and independent cause of action" not because the text does not support that reading, but because such a reading would create "anomalous consequences" such as treating pregnancy "more favorably than any other basis" under Title VII. Pet. App. 21a. As this Court explained in *Johnson Controls*, 499 U.S. at 204, however, the PDA *is* unique: "The PDA's amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" (quoting 42 U.S.C. § 2000e(k)). Eschewing this Court's holding that "the PDA means what it says," *id.* at 211, the court below departs from the text and its intended meaning to circumscribe protection for pregnant workers.

Third, by carving out three categories of temporarily disabled workers who may not be used as comparators, the Fourth Circuit's ruling relegates pregnant workers to a status worse than virtually all other workers. Treating pregnancy as a category with no obvious comparator is exactly the type of approach endorsed in *Gilbert* but subsequently repudiated by Congress through the PDA. The rejection of this approach was confirmed by this Court in *Guerra*, which held that pregnant workers are to be treated no worse than comparably disabled workers. Indeed,

the PDA is "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." *Guerra*, 479 U.S. at 285.

As this Court made clear in *Guerra*, under the PDA, a comparator may be selected *only* on the basis of ability or inability to work: the employer's motivation for accommodating the needs of the comparator is irrelevant. This remains true when the employer is compelled to treat a comparator in a certain manner in order to comply with some other law. In *Guerra*'s alternate holding, this Court ruled that even if the PDA required identical treatment – no better, no worse – of pregnant workers and comparably disabled workers, an employer could comply with the PDA and California's law mandating maternity leave by voluntarily providing the same leave to other disabled workers. *Id.* at 290-91. The fact that the pregnant workers were protected by an independent legal mandate would have had no effect on the employer's duty to comply with the PDA by treating both groups the same. *Id.* Yet, in the face of this clear rule, the court below rejects Young's interpretation of the PDA precisely because it means that a pregnant worker placed under a lifting restriction by a doctor could "receive whatever accommodation or benefits are accorded to an individual accommodated under the ADA, because the pregnant worker and the other individual are similar in their ability or inability to work – i.e., they both cannot work." Pet. App. 22a.

While the Fourth Circuit's reading of the PDA is the most restrictive to date, four other appellate

courts have also mistakenly upheld light-duty policies that accommodate some temporarily disabled employees, but refuse accommodation for pregnancy-related disability. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998), *cert. denied*, 525 U.S. 1000 (1998). Two federal appellate rulings, meanwhile, have taken an opposing view about the proper analysis in light-duty cases. *See EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996). *See also* Pet. at 16-21 (discussing split).

II. The Expansion of the Americans with Disabilities Act Will Further Dismantle the PDA if the Court of Appeals' Ruling is Allowed to Stand.

Most courts have held that the ADA, in its original version, is inapplicable to any disability arising from a normal pregnancy. *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970 (S.D. Iowa 2002); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. Rev. 443, 445-47 (2012) (discussing cases). By refusing to allow pregnant workers to seek the same accommodations granted to employees protected by the ADA, *see* Pet. App. 27a, the ruling below has inappropriately limited the comparative right of

accommodation guaranteed by the second clause of the PDA. As explained in part I, this erroneous interpretation of the PDA flatly violates this Court's precedents established in *Guerra* and *Johnson Controls*, which make clear that an employer's motive for providing accommodations to any particular group (or denying them to another group) is irrelevant to the question of whether the employer has fulfilled its obligation to provide pregnant workers with the same accommodations or benefits it provides others similar in their ability or inability to work.

This erroneous interpretation of the PDA, if allowed to stand, will be increasingly detrimental and unfair to pregnant women in future cases because of the ADA Amendments Act of 2008, 42 U.S.C.A. § 12102(2)(A) (2012) ("ADAAA"). The ADAAA and its regulations provide that employers must now offer reasonable accommodations for a broader set of impairments, including those that substantially limit one's ability to lift, walk, stand, or bend, even when the impairments are temporary in nature. *See id.* (identifying major life activities the substantial impairment of which qualifies an individual for coverage); 29 C.F.R. § 1630.2(i) & (j)(ix) (2012) (explaining new standard for impairments and stating that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section"); 29

C.F.R. pt. 1630 app. (2012) (similar).[2] Thus, under the reasoning of the lower court, many of the employees who will now be protected under the ADAAA and should be comparators for pregnant women – those who, for example, on a short-term basis, suffer lower back pain, an inability to lift heavy objects, or difficulty standing for prolonged periods – will be unavailable for comparison, despite their similar ability or inability to work. The reasoning in *Young* and other appellate cases reaching a similar result "suggests that the expansion of ADA rights could have the perverse effect of decreasing employers' obligations to pregnant employees by reducing significantly the pool of potential comparators considered under a PDA claim." Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 964-65 (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221332.

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[2] Young's claim arose prior to the enactment of the ADAAA. The rulings that the ADA does not cover disability related to normal pregnancy do not foreclose the possibility that future plaintiffs needing workplace accommodations for pregnancy-related limitations may have a claim under the amended, more expansive ADA. *See* Joan C. Williams et al., *I Just Need Water: Pregnancy Accommodation after the ADA Amendments Act of 2008*, 32 Yale L. & Pol'y Rev. ___ (forthcoming Jan. 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155817.

Such a result would turn the ADAAA into a repeal by implication of clause two of the PDA, by effectively gutting the class of comparators the PDA identifies for the treatment of pregnant workers. Any interpretation of a statute that results in a repeal by implication from a subsequently enacted statute is clearly disfavored. *See id.* at 1028-31.

The expansion of the ADA and the restrictive interpretation of the PDA by the Fourth Circuit and other courts combine to leave pregnant women virtually in a class of their own, without protection under a statute that, by design, is premised on comparison to co-workers similar in their ability or inability to work.

III. The Fourth Circuit's Approach Turns the Second Clause of the PDA Into a Search for Animus and Misconceives the Gender Stereotyping Behind Pregnancy Discrimination.

In finding the UPS light-duty policy to be "pregnancy neutral," despite its unfavorable treatment of pregnancy-based limitations compared to multiple classes of conditions with a similar effect on ability to work, the Fourth Circuit effectively requires proof of animus above and beyond the differential treatment of pregnancy. The district court, the ruling and reasoning of which the Fourth Circuit affirmed, explained its approach explicitly in terms of animus, in

asking "whether a reasonable inference can be drawn that the employer has animus directed *specifically* at pregnant women." Pet. App. 61a (emphasis in original). As long as the employer's policy can be described without reference to pregnancy – by identifying in pregnancy-neutral terms the preferred classes of conditions that are entitled to light-duty accommodations – this approach allows an employer's accommodation policy itself to defeat any inference of an intent to discriminate against pregnant workers.

Reading in a new requirement that a plaintiff demonstrate that pregnancy-based animus motivated the employer's failure to accommodate pregnancy as generously as other classes of limitations violates the terms of the PDA. As Petitioner explains, requiring proof of pregnancy-based animus cannot be reconciled with the plain language of the PDA's second clause, which makes the disfavored treatment of pregnancy, compared to other conditions similarly affecting work, a violation of the Act without any inquiry into the reasons for the differential treatment. *See* Pet. 10-11. *See also Johnson Controls*, 499 U.S. at 199 ("explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). For this reason alone, the decision below is incorrect and must be vacated in order to restore the full scope of the PDA.

The Fourth Circuit's approach is also incorrect because it fails to grasp what Congress recognized in enacting the PDA: the failure to accommodate pregnancy as generously as other conditions similarly

affecting work is itself based on gender stereotyping. By requiring additional proof of animus, the Fourth Circuit misconceives the nature of pregnancy discrimination and ignores the lessons taught by Congress' overruling of this Court's decision in *Gilbert*. The refusal to accommodate pregnancy to the same extent as comparably disabling conditions reflects and reinforces a gender ideology that is incompatible with women's full participation in the labor force.

When an employer refuses to grant light-duty assignments to pregnant workers, while doing so for workers with other conditions affecting ability to work, it casts pregnancy as a unique liability undeserving of accommodation that could allow pregnant women to remain on the job. This judgment devalues pregnant workers' contributions to paid employment, while elevating women's maternal roles in reproduction and caretaking. The question whether to accommodate pregnancy itself triggers descriptive and prescriptive stereotypes about how pregnancy and motherhood affect women's attachment to the labor force. Searching for pregnancy-based "animus" does not capture this dynamic, in which a reverence for maternity is paired with predictions (will she return or won't she?) and prescriptions about how pregnancy (and later, motherhood) affects women's labor force participation (does she belong on the job or at home?).

The gender stereotyping behind pregnancy discrimination makes for a poor fit with a search for overt animus. Lingering ambivalence about pregnant employees and new mothers in the work force is

masked by an overlay of reverence for pregnancy and motherhood. Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. Soc. Issues 701, 703 (2004) (discussing social science finding that mixed-valence stereotyping – e.g., ranking mothers high on warmth but low on competence – triggers distinctive paths of prejudice). Motherhood is "normal" in the descriptive sense that most women become mothers and in the prescriptive sense that it fulfills a socially expected role. *See* Martha Chamallas, *Introduction to Feminist Legal Theory* 372 (2d ed. 2003) (citing census data showing that only 18% of women will not have given birth by their 44th birthday).

Rather than appearing as overt animus, pregnancy discrimination may coincide with a glorification of pregnancy and an elevation of women's maternal roles. *Cf.* Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 Mich. J. Gender & L. 229, 250-53 (2012) (discussing "the mama grizzly" as a modernized cultural ideal in which mothers are lauded for their zeal in protecting children). As with the separate spheres ideology of old, the veneration of pregnancy and motherhood simultaneously marginalizes women's contributions as workers. *See, e.g.*, Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. Soc. 1297, 1306 (2007) (discussing research showing a conflict between intensive mothering norms and perceptions of mothers' competence at work).

Like other gender stereotypes, the stereotyping here is influenced by race and class. Researchers investigating how stereotypes affect working mothers have found that white mothers are viewed more positively when they stay home with their children, while African American mothers are viewed more positively when they work outside the home. *See* Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 Geo. J. Poverty L. & Pol'y 1, 39 (2012) (discussing studies). At the same time, African American women are more likely to be stereotyped as unreliable workers after becoming mothers. *Id.* Rather than a protective reverence for their maternity, African American women are subjected to a gender ideology that expects them to work unimpaired and unaffected by pregnancy and motherhood. While the gender stereotyping around work and pregnancy affects women differently, it remains in all instances poorly suited to a judicial search for conscious, pregnancy-based animus.

Unlike the Fourth Circuit below, and the other circuits that have taken this approach, this Court has correctly grasped the gender stereotyping that underlies the differential treatment of maternity in employer policies. As the Court explained, in upholding Congress' Fourteenth Amendment power to enact inclusive, gender-neutral family leave requirements as a remedy for sex discrimination, employers engage in gender stereotypes when they design leave policies based on presumptions about mothers' and fathers' differential attachments to the labor force. *See Nev.*

Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (noting, with reference to gender-differentiated leave laws, that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread"). Although the traditional practice of extending maternity leave to women, without comparable paternity leave to men, may have appeared beneficial to women on the surface, such policies were based on "the pervasive sex-role stereotype that caring for family members is women's work." *Id.* at 731.

A similar gender ideology underlies employer policies that accommodate workers with various conditions affecting work, but not pregnancy. Treating some conditions as more compatible with workforce participation and more worthy of employer accommodation is part of the "self-fulfilling cycle" of "mutually reinforcing stereotypes" that promotes "stereotypical views about women's commitment to work and their value as employees." *Id.* at 736. Collapsing the PDA's second clause into a search for animus fails to capture the gender stereotyping underlying this more "subtle discrimination" that would be "difficult to detect on a case-by-case basis" requiring particularized proof of animus. *Id.* The second clause ties the treatment of pregnancy to other conditions similarly affecting work precisely because of the role gender stereotypes have played in employer policies setting pregnancy apart.

IV. The Fourth Circuit's Approach Makes the PDA an Ineffective Remedy for Women in Need of Its Protection.

As Petitioner explains, the Fourth Circuit has now joined the other circuits that have drained the second clause of its stated protection against employer policies that treat certain specified classes of conditions more favorably than pregnancy, despite similar impacts on work capacity. Together, these decisions have substantially undercut the PDA as a remedy against pregnancy discrimination, even as claims of pregnancy discrimination are on the rise. *See, e.g.*, Tresa Baldas, *Pregnancy Discrimination Suits Are Steadily Rising*, Nat'l L.J., Apr. 14, 2006, at 4 (noting increase in pregnancy discrimination lawsuits). Some have theorized that these court decisions weakening the PDA may be partly to blame. Lesley Alderman, *When the Stork Carries a Pink Slip*, N.Y. Times, Mar. 28, 2009, at B6 (reporting suspicion among lawyers that "some employers are now using the law's laxity and the dismal economy to tacitly discriminate against new or expectant mothers").

Women make up nearly half the labor force. *See* Bureau of Labor Statistics, *Women as a Percent of Total Employed in Selected Occupations, 2011* (May 1, 2012). The vast majority of working women will become pregnant at least once during their careers. Jeanette N. Cleveland et al., *Women and Men in Organizations: Sex and Gender Issues at Work* 208 (2000) (estimating that 75% of working women are likely to give birth at least once while working); Hal

G. Gueutal & Elisabeth M. Taylor, *Employee Pregnancy: The Impact on Organizations, Pregnant Employees and Co-workers*, 5 J. Bus. & Psychol. 459, 459 (1991) (90%). Yet, despite its prevalence in the workplace, pregnancy continues to be a source of employment bias. Studies from the early 1990's began documenting the prevalence of pregnancy-bias in the workplace and detrimental effects on a woman's career. *See* Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. Org'l Behav. 649 (1993) (substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers) and Sara J. Corse, *Pregnant Managers and Their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships*, 26 J. Applied Behav. Sci. 25 (1990) (pregnant managers penalized when they acted firmly in a conflict situation instead of conforming to expectations that pregnant women are more empathetic and nurturing). Pregnancy bias on the job remains. A more recent study found that retail store workers responded hostilely to pregnant job applicants, even as they reacted benevolently to pregnant customers. Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. Applied Psychol. 1499 (2007). A follow-up study found that the negative reactions to pregnant applicants escalated when the applicants applied for jobs traditionally

held by men. *Id.* Other research shows that pregnant women are rated as less competent and less suited for promotion than non-pregnant workers performing at the same level, and that pregnant workers are less likely to be recommended for hire or promotion and receive lower salary recommendations. *See* Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 Sex Roles 497 (2007); Jennifer DiNicolis Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 Sex Roles 215 (2002); Caroline Gatrell, *Managing the Maternal Body: A Comprehensive Review and Transdisciplinary Analysis*, 13 Int'l J. Mgmt. Revs. 97, 98-100 (2011) (literature review of studies finding pregnancy a trigger for bias against workers). One researcher coined the term "pregnant presenteeism" for the phenomenon of pregnant workers seeking to compensate for employer bias by presenting themselves as healthy and remaining at work even when they are unwell. Caroline Jane Gatrell, *"I'm a Bad Mum": Pregnant Presenteeism and Poor Health at Work*, 72 Soc. Sci. & Med. 478 (2011). Pregnant "presenteeism" becomes necessary when a woman cannot expect the same level of protection that workers with similar restrictions receive.

As the PDA implicitly recognizes, the failure to accommodate pregnancy in the workplace on the same terms as similarly restrictive conditions is part and parcel of the bias against pregnant workers.

The refusal to extend the same accommodations as they provide to other classes of employees devalues pregnant workers.

Pregnancy discrimination is a special concern for working class women and women in lower wage jobs. *See* Gatrell, *Managing the Maternal Body*, *supra*, at 104-05 (reviewing literature on pregnancy discrimination and class indicating working class mothers are as likely to experience unfair treatment while pregnant as managers). Indeed, women in working class jobs and lower wage jobs are the most likely to experience work conflicts while pregnant, and are most in need of the protections that the PDA's second clause promises. Professional women who work for employers with generous policies and an emphasis on employee retention may be able to secure any needed accommodations without the help of the PDA. *See, e.g.*, Bureau of Labor Statistics, *Employee Benefits in the United States – March 2012*, at 16 (July 11, 2012) (90 percent of workers in the top 10 percent of earnings have paid sick days, compared with only 23 percent of workers in the bottom 25 percent). Other women may not be so lucky. Women who perform physically demanding jobs, such as police work, firefighting jobs, construction work and factory jobs, often require some accommodation of their job duties during pregnancy in order to remain on the job. *Cf.* Corina Schulze, *Institutionalized Masculinity in US Police Departments: How Maternity Leave Policies (or Lack Thereof) Affect Women in Policing*, 23 Crim. J.

Stud. 177 (2010) (discussing failure of police departments to accommodate pregnancy with maternity uniforms, off-street modified duties, or maternity leave policies). Other jobs may conflict with pregnancy not because they are physically strenuous but because they take place in rigidly structured work environments, such as factory assembly lines, or customer service call centers. Women in these kinds of jobs are the least likely to be able to afford the lost pay if conflicts between pregnancy and work force them out of a job.

Pregnancy discrimination cases bear this out. Like the court below, courts have allowed employers to deny pregnant workers light duty accommodations for physically strenuous job tasks, despite having granted them to other workers with medical restrictions. *See, e.g., Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698 (7th Cir. 2012) (pregnant stocker denied light-duty exception from 50-pound lifting requirement despite availability of light duty for ADA-eligible employees); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011) (activity director at a nursing home denied accommodation for occasional physically strenuous tasks, despite employer policy accommodating ADA-qualified disabilities and on-the-job injuries). Employers have even denied pregnant women in low-wage jobs very minor and low-cost accommodations that are needed on a temporary basis in order to accommodate pregnancy, such as carrying a water bottle at work. *See Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, at *1

(D. Kan. July 21, 2009) (store policy barred pregnant employee who monitored fitting rooms from carrying a water bottle at work, notwithstanding her doctor's orders to regularly drink water).

Conflicts between pregnancy and work are especially pronounced for women in lower-wage jobs. One survey of cases found patterns of "workers fired on the spot or immediately after announcing a pregnancy, pregnant employees banned from certain positions no matter what their individual capabilities to do the job, and workers refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies." Bornstein, *supra*, at 5 (survey of cases in UC-Hastings College of Law Center for WorkLife Law database). That survey found "an extreme hostility to pregnancy in low-wage workplaces," and even revealed instances where pregnant workers were told by their supervisors to terminate their pregnancies. *Id.* It also found that pregnant women of color were treated especially harshly and were more likely to be denied accommodations granted to other pregnant workers. *Id. Cf.* Paula McDonald et al., *Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress*, 39 Indus. Rel. J. 229, 237 (2008) (Australian study finding that most cases of pregnancy discrimination occurred in occupations lower on the occupational ladder, such as sales/personal service work and lower-skilled administrative workers). Without effective recourse to the PDA, the women ensnared in such conflicts will face

difficulty re-entering the labor force if they lose their jobs during pregnancy. These disruptions have long-term consequences for women's workforce participation. Diane M. Houston & Gillian Marks, *The Role of Planning and Workplace Support in Returning to Work after Maternity Leave*, 41 British J. of Indus. Rel. 197 (2003) (discussing research showing that an employee's experiences in the workplace while pregnant influence her decisions about whether and when to return to work after childbirth).

Pregnancy discrimination is the first block in the maternal wall. When women are forced out of a job because employers refuse to treat pregnancy as well as other conditions found deserving of accommodations, it jeopardizes their economic security and that of their families. Gaps in the labor force that occur during pregnancy can lead to longer absences from the work force, which become self-reinforcing. Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* 41 (2010) (noting that even brief absences from the work force have longer-term negative effects on women's economic prospects); Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 Harv. J. L. & Gender 57, 75 (2012) (describing how women's labor force gaps reinforce men's diminished caretaking roles).

The PDA case law in the lower courts, as exemplified by the Fourth Circuit's decision, has left those women most in need of the law's protection from pregnancy discrimination without an effective remedy

for it. This Court must once again instruct the lower courts that the PDA means what it says.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHELLE CAIOLA
Senior Staff Attorney
LEGAL MOMENTUM
395 Hudson Street
New York, NY 10014
(212) 925-6635

JOANNA L. GROSSMAN
Counsel of Record
Sidney & Walter Siben
Distinguished Professor
of Family Law
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, NY 11549
(516) 463-5241

DEBORAH L. BRAKE
Professor of Law
and Distinguished
Faculty Scholar
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 648-2655

May 10, 2013

APPENDIX A

The *Amici* have substantial expertise in employment discrimination law and issues relating to women's workplace equality. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. For professors, their institutional affiliations are listed for identification purposes only.

Organizations

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for more than forty years. Legal Momentum advocates through the legal system and in cooperation with government agencies and policymakers to combat sex discrimination in employment. Legal Momentum has been at the national forefront of the movement to eliminate unjust barriers to women's economic security, such as pregnancy discrimination. In furtherance of that goal, Legal Momentum has represented several women working in non-traditional jobs who have been denied light duty positions while pregnant. Legal Momentum believes that employers who maintain light duty positions for a subset of workers, while denying light duty positions to pregnant women, are in violation of Civil Rights laws including the Pregnancy Discrimination Act and the Americans with Disabilities Act.

The Maurice and Jane Sugar Law Center for Economic and Social Justice is a national non-profit law center extensively engaged in labor and

employment law litigation, including gender and pregnancy discrimination. The Sugar Law Center is deeply interested in this case because its outcome affects the right of thousands of women workers employed in traditionally male workplaces and the ongoing harms occurring to women workers who become pregnant while working. The judgment of *amici* is based on over 15 years experience in public interest advocacy and representation on behalf of workers before administrative agencies and federal and state courts throughout the country. Our experience includes one of the first cases in the Midwest directly confronting the issues arising in this case, and is based on a history and mission of public advocacy that has included contacts with state and local elected officials who have sought understanding of the issues before the court in the present matter.

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to improving the legal and economic status of women and their families through litigation, public policy initiatives, public education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination by bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. WLP assists women who have been victims of pregnancy discrimination in employment through its telephone counseling service and through direct legal representation. The WLP has a strong

interest in the proper application of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.

Professors

Deborah L. Brake
Professor of Law and
Distinguished Faculty Scholar
University of Pittsburgh School of Law
3900 Forbes Ave.
Pittsburgh, PA 15260

Martha Chamallas
Robert J. Lynn Chair in Law
Moritz College of Law
The Ohio State University
55 W. 12th Ave.
Columbus, OH 43201

Jeannette Cox
Professor of Law
University of Dayton
300 College Park
Dayton, OH 45469-2772

Deborah Dinner
Associate Professor of Law
Washington University School of Law
Campus Box 1120, One Brookings Drive
St. Louis, MO 63130

Maxine Eichner
Reef Ivey II Professor of Law
UNC School of Law
CB #3380 Van Hecke-Wettach Hall
Chapel Hill, NC 27599-3380

Cary Franklin
Assistant Professor
University of Texas School of Law
727 East Dean Keeton St.
Austin, TX 78705

Leon Friedman
Joseph Kushner Distinguished Professor
of Civil Liberties Law
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

Joanna L. Grossman
Sidney & Walter Siben Distinguished
Professor of Family Law
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

Grant Hayden
Professor of Law
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

Jennifer S. Hendricks
Associate Professor
University of Colorado Law School
Wolf Law Building, 401 UCB
Boulder, CO 80309

Laura T. Kessler
Professor of Law
University of Utah, S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, UT 84112

Nancy Levit
Curators' and Edward D. Ellison
Professor of Law
UMKC School of Law
500 E. 52nd St.
Kansas City, MO 64110

Marcia McCormick
Associate Professor of Law
Saint Louis University School of Law
3800 Lindell Blvd.
St. Louis, MO 63108

Laura Rosenbury
Professor of Law
Washington University in St. Louis
One Brookings Drive
St. Louis, MO 63130

Ann C. McGinley
William S. Boyd Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas
4505 Maryland S. Parkway – Box 451003
Las Vegas, NV 89154

Angela Onwuachi-Willig
Charles M. and Marion J. Kierscht Professor of Law
University of Iowa College of Law
456 Boyd Law Building
Iowa City, IA 52242

Nicole Buonocore Porter
Professor of Law
University of Toledo College of Law
2801 W. Bancroft St., MS #507
Toledo, OH 43606

Deborah Rhode
Ernest W. McFarland Professor of Law
Director, Center on the Legal Profession
Director, Program on Social Entrepreneurship
at Stanford University
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305

Kerry L. Stone
Associate Professor of Law
Florida International University
College of Law
University Park
11200 S.W. 8th St.
RDB 2041
Miami, FL 33199

Michelle A. Travis
Professor of Law
University of San Francisco School of Law
2130 Fulton St.
San Francisco, CA 94117

Deborah Widiss
Associate Professor
Indiana University Maurer School of Law
211 S. Indiana Ave.
Bloomington, IN 47405

Joan C. Williams
Distinguished Professor of Law
Hastings Foundation Chair
Founding Director, Center for WorkLife Law
University of California, Hastings College of the Law
100 McAllister St.
San Francisco, CA 94102

Verna Williams
Judge Joseph Kinneary Professor of Law and
Co-Director of the Center for Race, Gender,
and Social Justice
University of Cincinnati College of Law
P.O. Box 210040
Clifton Ave. & Calhoun St.
Cincinnati, OH 45221-0040

JOINT APPENDIX

Supreme Court, U.S.
FILED
SEP - 4 2014
OFFICE OF THE CLERK

No. 12-1226

In The
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX, VOLUME I

SAMUEL R. BAGENSTOS
Counsel of Record
625 South State Street
Ann Arbor, MI 48109
(734) 764-1358
sambagen@umich.edu
Counsel for Petitioner

MARK A. PERRY
Counsel of Record
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500
mperry@gibsondunn.com
Counsel for Respondent

Petition For Certiorari Filed April 8, 2013
Certiorari Granted July 1, 2014

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WWW.COCKLELEGALBRIEFS.COM

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Relevant Docket Entries for the United States District Court District of Maryland (Greenbelt) CIVIL DOCKET FOR CASE #: 8:08-cv-02586DKC

Oct. 03, 2008	COMPLAINT against United Parcel Service of America, Inc., United Parcel Service, Inc., UPS Health Program, Aetna Life Insruance Company, Aetna Disability and Absence Management (Filing fee $ 350 receipt number 84637013199.), filed by Peggy Young. (Attachments: #'1 Civil Cover Sheet) (ch, Deputy Clerk) (Entered: 10/07/2008)
Oct. 03 2008	Jury Trial Demand by Peggy Young. (ch, Deputy Clerk) (Entered: 10/07/2008)
Oct. 07, 2008	Summons Issued 20 days as to United Parcel Service of America, Inc., United Parcel Service, Inc., UPS Health Program, Aetna Life Insruance Company, Aetna Disability and Absence Management. (ch, Deputy
Oct. 07 2008	Correspondence re: ECF Warning Letter to Sharon Fast Gustafson (ch, Deputy Clerk) (Entered: 10/07/2008)
Oct. 29. 2008	AMENDED COMPLAINT against United Parcel Service of America, Inc., United Parcel Service, Inc., filed by Peggy Young.(Gustafson, Sharon) (Entered: 10/29/2008)
Oct. 30, 2008	PAPERLESS ORDER: Plaintiff has filed an amended complaint that dismisses the claims against UPS Health Program, Aetna Life Insurance

	Company, and Aetna Disability and Absence Management. Accordingly, the Defendants UPS Health Program, Aetna Life Insurance Company, and Aetna Disability and Absence Management are DISMISSED from this case. Signed by Judge Deborah K. Chasanow on 10/30/08. (Chasanow, Deborah) (Entered: 10/30/2008)
Dec. 03, 2008	WAIVER OF SERVICE Returned Executed by Peggy Young. United Parcel Service of America. Inc. waiver sent on 10/9/2008, answer due 12/8/2008; United Parcel Service, Inc. waiver sent on 10/9/2008, answer due 12/8/2008. (Gustafson, Sharon) (Entered: 12/03/2008)
Dec. 08, 2008	Defendants' ANSWER to 4 Amended Complaint by United Parcel Service of America, Inc., United Parcel Service, Inc..(Sherbine, Eric) (Entered: 12/08/2008)
Dec. 08, 2008	SCHEDULING ORDER: Discovery closes and status report due by 4/22/2009, motions due by 5/22/2009. Signed by Judge Deborah K. Chasanow on 12/8/08 (Chasanow Deborah) (Entered: 12/08/2008)
Dec. 09, 2008	NOTICE of Appearance by Emmett P. McGee, Jr on behalf of United Parcel Service of America, Inc., United Parcel Service, Inc. (McGee, Emmett) (Entered: 12/09/2008)

Dec. 10, 2008	NOTICE of Appearance by Jill Schultz Distler on behalf of United Parcel Service of America. Inc., United Parcel Service, Inc. (Distler, Jill) (Entered: 12/10/2008)
Dec. 16, 2008	Local Rule 103.3 Disclosure Statement by United Parcel Service of America, Inc United Parcel Service, Inc.. (Sherbine, Eric) (Entered: 12/16/2008)
Dec. 17, 2008	STIPULATION of Dismissal with Regard to United Parcel Service of America, Inc. by United Parcel Service of America, Inc., United Parcel Service. Inc.. (Sherbine. Eric) (Entered: 12/17/2008)
Dec. 17, 2008	Correspondence re: Joint Initial Report (Sherbine, Eric) (Entered: 12/17/2008)
Dec. 17, 2008	PAPERLESS ORDER APPROVING 12 Stipulation of Dismissal of the Defendant United Parcel Service of America, Inc. Signed by Judge Deborah K. Chasanow on 12/17/08. (Chasanow, Deborah) (Entered: 12/17/2008)
Jan. 13. 2009	ORDER REFERRING CASE to Magistrate Judge William Connelly for settlement. Signed by Judge Deborah K. Chasanow on 1/13/09. (rmw, Chambers) (Entered: 01/13/2009)
Jan. 28, 2009	PAPERLESS ORDER AMENDING the Scheduling Order (Docket No. 8). The Discovery deadline: submission of status report is extended to June 15, 2009; Requests for admission is

	extended to June 22, 2009; Dispositive pretrial motions deadline is extended to July 22, 2009. These extensions are ordered to accommodate a settlement conference which will be held on March 24, 2009 at 10:00 a.m. Signed by Magistrate Judge William Connelly on 01/28/09. (Connelly, William) (Entered: 01/28/2009)
Jan. 29, 2009	Letter/ORDER scheduling a settlement conference for March 24, 2009 at 10:00 a.m to be held in chambers. Signed by Magistrate Judge William Connelly on 1/29/09. (ch, Deputy Clerk) (Entered: 01/29/2009)
Mar. 24, 2009	Settlement Conference held on 3/24/2009 before Magistrate Judge William Connelly. (Connelly, William) (Entered: 03/24/2009)
May 14, 2009	MOTION to Compel Responses to Interrogatories and Document Requests by Peggy Young Responses due by 6/1/2009 (Attachments: # 1 Appendix Motion to Compel & Memorandum in Support, # 2 Exhibit 1-6 of Plaintiff's Motion to Compel, # 3 Exhibit 7-13 of Plainiff's Motion to Compel, # 4 Appendix Defendant's Opposition to Plaintiff's Motion to Compel, # 5 Appendix Rebuttal in Support of Plaintiff's Motion to Compel)(Gustafson, Sharon) Hard copy received 5/18/09- Modified on 5/18/2009 (ch, Deputy Clerk). (Entered: 05/14/2009)

May 26, 2009	MEMORANDUM OPINION. Signed by Judge Deborah K. Chasanow on 5/26/09. (sat, Chambers) (Entered: 05/26/2009)
May 26, 2009	ORDER GRANTING IN PART and DENYING IN PART 18 Motion to Compel. Signed by Judge Deborah K. Chasanow on 5/26/09. (sat, Chambers) (Entered: 05/26/2009)
May 26, 2009	Request for Hearing on Plaintiff's Motion to Compel. (Gustafson, Sharon) (Entered: 05/26/2009)
May 27, 2009	Consent MOTION for Protective Order by United Parcel Service, Inc. Responses due by 6/15/2009 (Attachments: # 1 Text of Proposed Order)(Sherbine, Eric) (Entered: 05/27/2009)
May 27, 2009	PAPERLESS ORDER GRANTING 22 Consent Motion for the Entry of Stipulated Order Regarding Confidentiality of Discovery Material. Signed by Judge Deborah K. Chasanow on 5/27/09. (Chasanow, Deborah) (Entered: 05/27/2009)
May 27, 2009	RESPONSE re 21 Request for Hearing on Plaintiff's Motion to Compel filed by United Parcel Service, Inc.. (Sherbine, Eric) (Entered: 05/27/2009)
May 28, 2009	MOTION for Other Relief Plaintiff's Motion to Clarify, Motion for Reconsideration in Part, and Request for a Hearing by Peggy Young Responses due by 6/15/2009 (Attachments: # 1 Appendix Memorandum in Support of

	Plaintiff's Motion to Clarify, Motion for Reconsideration in Part, and Request for a Hearing, # 2 Text of Proposed Order) (Gustafson, Sharon) (Entered: 05/28/2009)
June 03, 2009	PAPERLESS ORDER CONFIRMING that a telephone conference with counsel is scheduled Thursday, June 4, 2009, at 4:00 p.m: Chambers will initiate the conference call. Signed by Judge Deborah K Chasanow on 6/3/09. (Chasanow, Deborah) (Entered: 06/03/2009)
June 03, 2009	MOTION for Protective Order With Respect to Rule 30(b)(6) Deposition by United Parcel Service, Inc. Responses due by 6/22/2009 (Attachments: # 1 Memorandum in Support, # 2 Certificate of Compliance with Local Rule 1047, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Exhibit G) (Sherbine, Eric) (Entered: 06/03/2009)
June 04, 2009	NOTICE by Peggy Young of Removal of Request for Emergency Hearing (Gustafson, Sharon) (Entered: 06/04/2009)
June 04, 2009	PAPERLESS ORDER CONFIRMING that the telephone conference scheduled on Thursday, June 4, 2009, at 4:00 p.m. has been removed from the Court's calendar. Signed by Judge Deborah K. Chasanow on 6/4/09. (Chasanow, Deborah) (Entered: 06/04/2009)

June 06, 2009	MOTION to Amend/Correct 4 Amended Complaint and Memorandum in Support by Peggy Young Responses due by 6/23/2009 (Attachments: # 1 Appendix Second Amended Complaint, # 2 Appendix Second Amended Complaint (Redlined), # 3 Affidavit Statement of Peggy Young with Exhibits 1-14, # 4 Exhibit 15: Correspondence, # 5 Affidavit Arline Stmt., # 6 Affidavit Gatton Stmt., # 7 Affidavit Reyna Stmt., # 8 Text of Proposed Order Proposed Order)(Gustafson, Sharon) Hard copy received 6/9/09-Modified on 6/9/2009 (ch, Deputy Clerk). (Entered: 06/06/2009)
June 10, 2009	MOTION for Extension of Time by United Parcel Service, Inc. Responses due by 6/29/2009 (Attachments: # 1 Memorandum in Support)(Sherbine. Eric) (Entered: 06/10/2009)
June 10, 2009	LETTER/ORDER GRANTING 31 Motion to Modify Scheduling Order. New deadlines will be set once pending motions are adjudicated. Signed by Judge Deborah K. Chasanow on 6/10/09. (sat, Chambers) (Entered: 06/10/2009)
June 15, 2009	RESPONSE in Opposition re 25 MOTION for Other Relief Plaintiff's Motion to Clarify, Motion for Reconsideration in Part, and Request for a Hearing filed by United Parcel Service, Inc.. Replies due by 6/29/2009.

(Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Sherbine, Eric) (Entered: 06/15/2009)

June 17, 2009 34 RESPONSE in Opposition re 27 MOTION for Protective Order With Respect to Rule 30(b)(6) Deposition MOTION for Protective Order With Respect to Rule 30(b)(6) Deposition filed by Peggy Young. Replies due by 7/1/2009. (Attachments: # 1 Exhibit A: Deposition of Carol Martin, selected pages)(Gustafson, Sharon) Hard copy received 6/18/09-Modified on 6/18/2009 (ch, Deputy Clerk). (Entered: 06/17/2009)

June 18, 2009 MOTION to Dismiss for Lack of Jurisdiction by United Parcel Service, Inc. Responses due by 7/6/2009 (Attachments: # 1 Memorandum in Support of Motion, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6)(Distier, Jill) Hard copy received- Modified on 6/23/2009 (ch, Deputy Clerk). (Entered: 06/18/2009)

June 21, 2009 REPLY to Response to Motion re 25 MOTION for Other Relief Plaintiff's Motion to Clarify, Motion for Reconsideration in Part, and Request for a Hearing filed by Peggy Young. (Gustafson, Sharon) (Entered: 06/21/2009)

June 22, 2009 RESPONSE in Opposition re 30 MOTION to Amend/Correct 4 Amended

	Complaint and Memorandum in Support MOTION to Amend/Correct 4 Amended Complaint and Memorandum in Support MOTION to Amend/ Correct 4 Amended Complaint and Memorandum in Support filed by United Parcel Service, Inc.. Replies due by 7/6/2009. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, #7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Sherbine, Eric) Hard copy received-Modified on 6/23/2009 (ch, Deputy Clerk). (Entered: 06/22/2009)
June 25, 2009	RESPONSE in Opposition re 35 MOTION to Dismiss for Lack of Jurisdiction filed by Peggy Young. Replies due by 7/9/2009. (Attachments: # 1 Affidavit Affidavit of Sharon Fast Gustafson with Exhibits)(Gustafson, Sharon) Hard copy received 6/29/09 – Modified on 6/30/2009 (ch, Deputy Clerk). (Entered: 06/25/2009)
June 29, 2009	REPLY to Response to Motion re 30 MOTION to Amend/Correct 4 Amended Complaint and Memorandum in Support MOTION to Amend/Correct 4 Amended Complaint and Memorandum in Support MOTION to Amend/ Correct 4 Amended Complaint and Memorandum in Support filed by Peggy Young. (Attachments: # 1 Exhibit 16-33)(Gustafson, Sharon) Hard copy

	received 7/1/09-Modified on 7/1/2009 (ch, Deputy Clerk). (Entered: 06/29/2009)
July 01, 2009	REPLY to Response to Motion re 27 MOTION for Protective Order With Respect to Rule 30(b)(6) Deposition MOTION for Protective Order With Respect to Rule 30(b)(6) Deposition filed by United Parcel Service, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F)(Sherbine, Eric) Hard copy received 7/6/09-Modified on 7/6/2009 (ch, Deputy Clerk). (Entered: 07/01/2009)
July 02, 2009	REPLY to Response to Motion re 35 MOTION to Dismiss for Lack of Jurisdiction filed by United Parcel Service, Inc.. (Attachments: # 1 Exhibit 1)(Distler, Jill) (Entered: 07/02/2009)
July 02, 2009	MOTION for Sanctions by United Parcel Service, Inc. Responses due by 7/20/2009 (Attachments: # 1 Memorandum In Support, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Certification of Service of Rule 11 Motion for Sanctions, # 8 Exhibit 1 to Certification of Service, # 9 Exhibit 2 to Certification of Service)(Sherbine, Eric) Hard copy received 7/7/09-Modified on 7/7/2009 (ch, Deputy Clerk). (Entered: 07/02/2009)
Mar. 30, 2010	MEMORANDUM OPINION. Signed by Chief Judge Deborah K. Chasanow

	on 3/30/10. (sat, Chambers) (Entered: 03/30/2010)
Mar. 30, 2010	ORDER DENYING 35 motion to dismiss for lack of subject matter jurisdiction, DENYING 30 motion to leave to file second amended complaint, GRANTING IN PART and DENYING IN PART 25 motion to clarify, motion for reconsideration in part, and request for a hearing, GRANTING 27 motion for protective order, and DENYING without prejudice 42 motion for sanctions. Signed by Chief Judge Deborah K. Chasanow on 3/30/10. (sat. Chambers) (Entered: 03/30/2010)
Apr. 09, 2010	PAPERLESS ORDER CONFIRMING that a telephone conference with counsel is scheduled Wednesday, April 28, 2010, at 9:00 a.m. Chambers will initiate the conference call. Signed by Chief Judge Deborah K. Chasanow on 4/9/10. (Chasanow, Deborah) (Entered: 04/09/2010)
Apr. 28, 2010	Telephone Conference held on 4/28/2010 before Chief Judge Deborah K. Chasanow. (sat. Chambers) (Entered: 04/28/2010)
Apr. 28 2010	LETTER/ORDER CONFIRMING the schedule set following the telephone conference with counsel. Discovery has recommenced and will be completed by June 30. At the conclusion of discovery, counsel are to file a joint status

	report. Requests for admissions will be due July 7 and dispositive pretrial motions will be due July 30. Plaintiff may have until August 31 to respond to Defendants anticipated motions and Defendant may extend the reply due date, if necessary. Signed by Chief Judge Deborah K. Chasanow on 4/28/10. (sat, Chambers) (Entered: 04/28/2010)
May 04, 2010	Telephone Conference held on 5/4/2010 before Chief Judge Deborah K. Chasanow (sat, Chambers) (Entered: 05/04/2010)
May 26, 2010	MOTION to Withdraw as Attorney by United Parcel Service, Inc. Responses due by 6/14/2010 (Sherbine, Eric) (Entered: 05/26/2010)
May 27, 2010	PAPERLESS ORDER GRANTING 47 Motion to Withdraw as Attorney. Attorney Eric Lawrence Sherbine terminated. Signed by Chief Judge Deborah K. Chasanow on 5/27/10. (Chasanow, Deborah) (Entered: 05/27/2010)
June 10, 2010	MOTION for Other Relief To Modify the Court's April 28, 2010 Letter Order to Defer Certain Depositions Until After the Court Has Ruled on Defendant's Summary Judgment Motion by United Parcel Service, Inc. Responses due by 6/28/2010 (Attachments: # 1 Memorandum in Support of Motion) (Distler, Jill) (Entered: 06/10/2010)

June 12, 2010	RESPONSE in Opposition re 49 MOTION for Other Relief To Modify the Courts April 28, 2010 Letter Order to Defer Certain Depositions Until After the Court Has Ruled on Defendant's Summary Judgment Motion filed by Peggy Young. Replies due by 7/1/2010. (Attachments: # 1 Memorandum in Support of Opposition)(Gustafson, Sharon) (Entered: 06/12/2010)
June 15, 2010	REPLY to Response to Motion re 49 MOTION for Other Relief To Modify the Court's April 28, 2010 Letter Order to Defer Certain Depositions Until After the Court Has Ruled on Defendant's Summary Judgment Motion filed by United Parcel Service. Inc.. (Distler, Jill) (Entered: 06/15/2010)
June 15, 2010	PAPERLESS ORDER CONFIRMING that a telephone conference with counsel is scheduled today, Tuesday, June 15, 2010, at 3:30 p.m. Chambers will initiate the conference call. Signed by Chief Judge Deborah K. Chasanow on 6/15/10. (Chasanow, Deborah) (Entered: 06/15/2010)
June 15, 2010	MOTION to Compel Attendance of Mia Johnson Lynch by Peggy Young Responses due by 7/2/2010 (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1, # 3 Text of Proposed Order)(Gustafson, Sharon) (Entered: 06/15/2010)

June 15, 2010	Telephone Conference held on 6/15/2010 before Chief Judge Deborah K. Chasanow. (sat, Chambers) (Entered: 06/15/2010)
June 15, 2010	PAPERLESS ORDER GRANTING 49 Defendant's motion to modify as follows: only necessary fact discovery will take place up to June 30, 2010. If stir-wary judgment is denied, discovery may resume subject to limitations to be decided later. Signed by Chief Judge Deborah K. Chasanow on 6/15/10. (Chasanow, Deborah) (Entered: 06/15/2010)
June 15, 2010	ORDER GRANTING 53 Motion to Compel. Mia Johnson Lynch will appear for her deposition on June 30, 2010, at a location to be agreed upon by counsel. Ms. Lynch will be notified by UPS' counsel as to the exact address. Signed by Chief Judge Deborah K. Chasanow on 6/15/10. (sat, Chambers) (Entered: 06/15/2010)
June 15, 2010	MOTION to Amend/Correct 54 Order on Motion for Other Relief, by Peggy Young Responses due by 7/2/2010 (Gustafson, Sharon) (Entered: 06/15/2010)
June 16, 2010	PAPERLESS ORDER CONFIRMING the deadline for filing of motion(s) to compel is extended. A new deadline will be set following a decision on any motion for summary judgment. Signed by Chief Judge Deborah K. Chasanow

	on 6/16/10. (Chasanow, Deborah) (Entered: 06/16/2010)
June 30, 2010	STATUS REPORT by United Parcel Service, Inc.. (Distler, Jill) (Entered: 06/30/2010)
June 30, 2010	STATUS REPORT by Peggy Young. (Gustafson, Sharon) (Entered: 06/30/2010)
July 30, 2010	MOTION for Summary Judgment by United Parcel Service, Inc.. Responses due by 8/16/2010 (Attachments: # 1 Memorandum in Support of Motion, # 2 List of Appendices, # 3 Appendix 1 Notice of Filing of Lengthy Document, # 4 Appendix 2, # 5 Appendix 3, # 6 Appendix 4, # 7 Appendix 5. # 8 Appendix 6, # 9 Appendix 7. # 10 Appendix 8, # 11 Appendix 9, # 12 Appendix 10, # 13 Appendix 11)(Distler, Jill) Courtesy hard copy received – submitted to Chambers 8/2/10. Hard copy of Lengthy Exhibit Appendix 1 received – filed separately 8/2/10. Modified on 8/2/2010 (ns, Deputy Clerk). (Entered: 07/30/2010)
July 31, 2010	MOTION for Leave to File Plaintiff's Third Motion to Compel by Peggy Young Responses due by 8/19/2010 (Attachments: # 1 Exhibit Plaintiff's Third Motion to Compel, # 2 Appendix Unredacted Martin Deposition Excerpts – See attachment 61-9 for redacted version, # 3 Appendix

	Unredacted Brien Deposition Excerpts – See-attachment 61-10 for redacted version, # 4 Appendix O'Donnell Deposition Excerpts, # 5 Appendix Exhibits 1-5, # 6 Appendix Exhibits 6-10, # 7 Appendix Exhibits 11-14, # 8 Appendix Notice of Filing of Documents Under Seal)(Gustafson, Sharon) Courtesy hard copy received – Submitted to Chambers 8/3/10 ns (Additional attachment(s) added on 9/17/2010: # 9 Appendix Redacted Martin Deposition Excerpts, # 10 Appendix Redacted Brien Deposition Excerpts) (kns, Deputy Clerk). Modified to attach redacted documents on 9/17/2010 (kns, Deputy Clerk). (Entered: 07/31/2010)
July 31, 2010	MOTION to Seal Motion to File Documents under Seal by Peggy Young Responses due by 8/19/2010 (Gustafson, Sharon) (Entered: 07/31/2010)
Aug. 02, 2010	MOTION to Continue under Rule 56(1) and for Leave to File Cross-Motion by Peggy Young Responses due by 8/19/2010 (Gustafson, Sharon) (Entered' 08/02/2010)
Aug. 03, 2010	– SEALED – NOTICE of Filing Under Seal Exhibits 15-17 to Plaintiff's Third Motion to Compel by Peggy Young (nss, Deputy Clerk) (Entered: 08/03/2010)
Aug. 03, 2010	Correspondence re: Defendant's Opposition to Plaintiff's Third Motion to Compel (Attachments: # 1 Opposition

	Brief, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7)(Distler, Jill)Courtesy copy received – submitted to Chambers 8/4/10 Modified on 8/4/2010 (ns, Deputy Clerk). (Entered: 08/03/2010)
Aug. 04, 2010	Correspondence re: Defendant's Brief Regarding the Parties' Status Reports (Distler, Jill) (Entered: 08/04/2010)
Aug. 04. 2010	Second MOTION to Seal (to File Documents Under Seal) by Peggy Young Responses due by 8/23/2010 (Gustafson, Sharon) (Entered: 08/04/2010)
Aug. 05, 2010	Telephone Conference held on 8/5/2010 before Chief Judge Deborah K. Chasanow. (sat, Chambers) (Entered: 08/05/2010)
Aug. 12, 2010	PAPERLESS ORDER DENYING 61 Plaintiff's motion for leave to file third motion to compel, DENYING 62 and 67 motions to seal as the motions did not contain proposed reasons supported by specific factual representations to justify the sealing and an explanation why alternatives to sealing would not provide sufficient protection, and GRANTING IN PART AND DENYING IN PART 63 motion for a continuance. Plaintiff will have until 9/13/10 to respond to 60 motion for summary judgment. Signed by Chief Judge Deborah K. Chasanow on

8/12/10. (Chasanow, Deborah) (Entered: 08/12/2010)

Aug. 31, 2010 MOTION for Other Relief to Dismiss in Part by Peggy Young Responses due by 9/17/2010 (Gustafson Sharon) (Entered: 08/31/2010)

Sept. 09, 2010 Emergency MOTION for Leave to File 70-Page Brief by Peggy Young Responses due by 9/27/2010 (Gustafson, Sharon) (Entered: 09/09/2010)

Sept. 09, 2010 RESPONSE in Opposition re 70 Emergency MOTION for Leave to File 70-Page Brief filed by United Parcel Service, Inc.. Replies due by 9/27/2010. (Distler, Jill) (Entered: 09/09/2010)

Sept. 10, 2010 REPLY to Response to Motion re 70 Emergency MOTION for Leave to File 70-Page Brief filed by Peggy Young. (Gustafson, Sharon) (Entered: 09/10/2010)

Sept. 10, 2010 PAPERLESS ORDER of the Court urging Plaintiff to edit and shorten response in opposition to 60 motion for summary judgment and GRANTING Plaintiff until 9/17/10 to file response. However, if more than 50 pages remains necessary, then Plaintiff may exceed the page limit by up to 15 pages. Signed by Chief Judge Deborah K. Chasanow on 9/10/10. (Chasanow, Deborah) (Entered: 09/10/2010)

Sept. 16. 2010 Consent MOTION Replace Exhibits to Plaintiff's Third Motion to Compel

	with Redacted Versions by United Parcel Service, Inc. Responses due by 10/4/2010 (Attachments: # 1 Memorandum in Support, # 2 Redacted version of 61-2, # 3 Redacted version of 61-3)(Distler, Jill) Modified on 9/17/2010 (elts, Deputy Clerk). [Hard copy rec'd – submitted to chambers] (Entered: 09/16/2010)
Sept. 16, 2010	PAPERLESS ORDER GRANTING 74 motion to replace exhibits to Plaintiff's third motion to compel with redacted versions. Signed by Chief Judge Deborah K. Chasanow on 9/16/10. (Chasanow, Deborah) (Entered: 09/16/2010)
Sept. 16, 2010	RESPONSE in Opposition re 60 MOTION for Summary Judgment by Defendant UPS filed by Peggy Young. Replies due by 10/4/2010. (Attachments: # 1 Appendix Memorandum in Opposition to UPS's Motion for Summary Judgment, # 2 Appendix Plaintiff's Annotation of UPS's Statement of Facts, # 3 Appendix Aksamit v. UPS (unpublished opinion), #4 Affidavit Statement of Arline-Young, # 5 Affidavit Statement of Cox, # 6 Affidavit Statement of Gatton, #7 Affidavit Statement of Gustafson, # 8 Affidavit Statement of Lynch, #9 Affidavit Statement of Reyna, # 10 Affidavit Statement of Robinson, # 11 Affidavit Statement of Scott, # 12 Affidavit

	Statement of Shawl, # 13 Affidavit Statement of Smith, # 14 Affidavit Statement of Welch, # 15 Affidavit Statement of Williams, Tynette, # 16 Affidavit Statement of Young, # 17 Appendix Deposition of Arline-Young, # 18 Appendix Deposition of Gatton, # 19 Appendix Deposition of Hill, # 20 Appendix Deposition of Martin, # 21 Appendix Deposition of McNair, # 22 Appendix Deposition of UPS (Gordanier), # 23 Appendix Deposition of UPS (McDonnell), # 24 Appendix Deposition of Williams, Tynette, # 25 Appendix Deposition of Young, # 26 Exhibit Plaintiff's Exhibits 1-8, # 27 Exhibit Plaintiff's Exhibits 9-15, # 28 Exhibit Plaintiff's Exhibits 16-22, # 29 Appendix Notice of Filing of Lengthy Documents)(Gustafson, Sharon) Courtesy hard copy received – submitted to Chambers. Lengthy exhibits filed separately. Modified on 9/21/2010 (ns, Deputy Clerk). (Entered: 09/16/2010)
Sept. 16, 2010	MOTION to Seal by Peggy Young Responses due by 10/4/2010 (Attachments: # 1 Appendix Notice of Filing of Lengthy Documents)(Gustafson, Sharon) Courtesy hard copy received – submitted to Chambers. Lengthy exhibits filed separately. Modified on 9/21/2010 (ns, Deputy Clerk). (Entered: 09/16/2010)

Sept. 16, 2010 Third MOTION to Compel (Certification per Local Rule 104.7) by Peggy Young Responses due by 10/4/2010 (Attachments. # 1 Appendix Reply Memorandum in Support of Plaintiff's Third Motion to Compel)(Gustafson, Sharon) (Entered: 09/16/2010)

Sept. 16, 2010 MOTION to Continue (Alternative Motion for Continuance under Rule 56(f)) by Peggy Young Responses due by 10/4/2010 (Gustafson, Sharon) (Entered: 09/16/2010)

Sept. 16, 2010 Corrected MOTION to Continue (Alternative Motion for Continuance under Rule 56(f)) by Peggy Young Responses due by 10/4/2010 (Gustafson, Sharon) (Entered: 09/16/2010)

Sept. 17, 2010 RESPONSE to Motion re 69 MOTION for Other Relief to Dismiss in Part filed by United Parcel Service, Inc.. Replies due by 10/4/2010. (Attachments: # 1 Exhibit 1. # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5)(Distler, Jill) Courtesy hard copy received – submitted to Chambers 9/20/10 ns. Modified on 9/20/2010 (ns, Deputy Clerk). (Entered: 09/17/2010)

Sept. 28, 2010 Consent MOTION for Extension of Time to File Response/Reply Consent Motion for Extension of Time for Defendant to File Reply Memorandum in Support of Motion for Summary Judgment, for Extension of Time for

	Defendant to File Opposition to Plaintiff's Alternative Motion for a Continuance under Rule 56(f), and for Defendant to Have Leave to File a Thirty-Page Reply Memorandum in Support of its Motion for Summary Judgment by United Parcel Service, Inc.. Responses due by 10/15/2010 (Attachments: # 1 Memorandum in Support)(Distler, Jill) (Entered: 09/28/2010)
Sept. 28, 2010	PAPERLESS ORDER GRANTING 82 Consent Motion for Extension of Time. Defendant's reply to 60 motion for summary judgment and response to 80 corrected motion to continue under Rule 56(f) is now due November 8, 2010. The 25 page limit may be exceeded by 5 pages. Signed by Chief Judge Deborah K. Chasanow on 9/28/10. (Chasanow, Deborah) (Entered: 09/28/2010)
Oct. 04, 2010	REPLY to Response to Motion re 69 MOTION for Other Relief to Dismiss in Part filed by Peggy Young. (Attachments: # 1 Exhibit 1-14)(Gustafson, Sharon) Courtesy hard copy received – submitted to Chambers 10/7/10 ns. Modified on 10/7/2010 (ns, Deputy Clerk). (Entered: 10/04/2010)
Nov. 08, 2010	REPLY to Response to Motion re 60 MOTION for Summary Judgment filed by United Parcel Service, Inc.. (Attachments: # 1 List of Appendices, # 2 Appendix 12, # 3 Appendix 13, #4

Appendix 14. # 5 Appendix 15, # 6 Appendix 16, # 7 Appendix 17, # 8 Appendix 18, # 9 Appendix 19 – Notice of Filing of Sealed Documents, # 10 Appendix 20 – Notice of Filing of Sealed Documents, # 11 Appendix 21 – Notice of Filing of Sealed Documents, # 12 Appendix 22 – Notice of Filing of Sealed Documents, # 13 Appendix 23 – Notice of Filing of Sealed Documents, # 14 Appendix 24 – Notice of Filing of Sealed Documents, # 15 Appendix 25 – Notice of Filing of Sealed Documents, # 16 Appendix 26, # 17 Appendix 27, # 18 Appendix 28, # 19 Appendix 29, # 20 Appendix 30, # 21 Appendix 31)(Distler, Jill)(hard copies recd 11/10/10, sent to chambers) Modified on 11/10/2010 (ns, Deputy Clerk). (Entered: 11/08/2010)

Nov. 08, 2010 – SEALED – NOTICE of Filing Under Seal Appendix 19 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)

Nov. 08, 2010 – SEALED – NOTICE of Filing Under Seal Appendix 20 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service. Inc. (Distler, Jill) (Entered: 11/08/2010)

Nov. 08, 2010 – SEALED – NOTICE of Filing Under Seal Appendix 21 to Reply Memorandum

	in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)
Nov. 08, 2010	– SEALED – NOTICE of Filing Under Seal Appendix 22 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)
Nov. 08, 2010	– SEALED – NOTICE of Filing Under Seal Appendix 23 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)
Nov. 08, 2010	– SEALED – NOTICE of Filing Under Seal Appendix-24 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)
Nov 08, 2010	– SEALED – NOTICE of Filing Under Seal Appendix 25 to Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc. (Distler, Jill) (Entered: 11/08/2010)
Nov. 08, 2010	MOTION to Seal Appendices 19-25 of Reply Memorandum in Further Support of Defendant's Motion for Summary Judgment by United Parcel Service, Inc Responses due by 11/26/2010

	(Attachments: #1 Memorandum in Support, # 2 Proposed Order)(Distler, Jill) (Entered: 11/08/2010)
Nov. 08, 2010	RESPONSE in Opposition re 80 Corrected MOTION to Continue (Alternative Motion for Continuance under Rule 56(f)) filed by United Parcel Service, Inc.. Replies due by 11/26/2010. (Attachments: #1 Memorandum in Support, #2 Exhibit 1)(Distler, Jill) (Entered: 11/08/2010)
Nov. 23, 2010	MOTION for Extension of Time to File Response/Reply in Support of Alternative Motion for Continuance under Rule 56(f) by Peggy Young Responses due by 12/10/2010 (Gustafson, Sharon) (Entered: 11/23/2010)
Nov, 23, 2010	PAPERLESS ORDER GRANTING IN PART 95 Motion for Extension of Time to File Reply. Friday, November 26 is a court holiday pursuant to Local Rule 504.1. Thus under Fed.R.Civ.P. 6, Plaintiff's reply would not be due until Monday, November 29. Plaintiff may have until Wednesday, December 1 to file her reply. Signed by Chief Judge Deborah K. Chasanow on 11/23/-10. (Chasanow, Deborah) (Entered: 11/23/2010)
Dec. 01, 2010	REPLY to Response to Motion re 80 Corrected MOTION to Continue (Alternative Motion for Continuance under Rule 56(f)) filed by Peggy Young.

	(Attachments: # 1 Exhibit 41: Leave Request)(Gustafson, Sharon) (Entered: 12/01/2010)
Feb. 14, 2011	MEMORANDUM OPINION. Signed by Chief Judge Deborah K. Chasanow on 2/14/11 (sat, Chambers) (Entered: 02/14/2011)
Feb. 14, 2011	ORDER GRANTING 60 motion for summary judgment, ENTERING judgment in favor of Defendant and against Plaintiff on all counts, DENYING 69 motion to dismiss in part. DENYING 80 motion to continue, DENYING 78 motion to compel, GRANTING 77 and 93 motions to seal, INCORPORATING all prior rulings herein and DECLARING this judgment final for purposes of Federal Rule of Civil Procedure 58, and DIRECTING the Clerk of Court to CLOSE this case. Signed by Chief Judge Deborah K. Chasanow on 2/14/11. (sat, Chambers) (Entered: 02/14/2011)
Feb. 23, 2011	MOTION for Reconsideration In Part by Peggy Young Responses due by 3/14/2011 (Gustafson, Sharon) (Entered: 02/23/2011)
Feb. 27, 2011	MOTION for Attorney Fees by United Parcel Service, Inc. Responses due by 3/17/2011 (Distler, Jill) (Entered: 02/27/2011)
Feb. 27, 2011	BILL OF COSTS by United Parcel Service, Inc.. Replies due by 3/17/2011. (Attachments: #1 Exhibit 1, # 2

	Exhibit 2. #3 Memorandum in Support, # 4 Affidavit)(Distler, Jill) Courtesy copy received – forwarded to Jarrett Perlow. Modified on 3/2/2011 (ns, Deputy Clerk). (Entered: 02/27/2011)
Mar. 10, 2011	RESPONSE in Opposition re 101 MOTION for Reconsideration In Part filed by United Parcel Service, Inc.. Replies due by 3/28/2011. (Attachments: # 1 Memorandum in Support, #2 Exhibit 1, # 3 Exhibit 2)(Distler, Jill) (Entered: 03/10/2011)
Mar. 7 2011	RESPONSE in Opposition re 103 Bill of Costs, filed by Peggy Young. Replies due by 4/4/2011. (Attachments: # 1 Exhibit 1: 5/31/10 Email, #2 Exhibit 2: Young Supplemental Statement) (Gustafson, Sharon) (Entered: 03/17/2011)
Mar. 17, 2011	RESPONSE in Opposition re 102 MOTION for Attorney Fees filed by Peggy Young. Replies due by 4/4/2011. (Gustafson, Sharon) (Entered: 03/17/2011)
Mar. 17, 2011	Consent MOTION to Stay Deadline for Defendant to File its Memorandum in Support of its Motion for Attorneys' Fees by United Parcel Service, Inc. Responses due by 4/4/2011 (Attachments: # 1 Memorandum in Support)(Distler, Jill) (Entered: 03/17/2011)
Mar. 18, 2011	ORDER GRANTING 107 consent motion to stay deadline for Defendant

	to file its memorandum in support of its motion for attorneys' fees. Defendant's memorandum in support of its motion for attorneys' fees is now due forty-five days after the court decides Plaintiff's motion for partial reconsideration or, if Plaintiff notes an appeal, fourteen days after the issuance of the mandate of the Court of Appeals. Signed by Chief Judge Deborah K. Chasanow on 3/18/11. (Chasanow, Deborah) (Entered: 03/13/2011)
Mar. 23, 2011	REPLY to Response to Motion re 101 MOTION for Reconsideration In Part filed by Peggy Young. (Gustafson, Sharon) (Entered: 03/23/2011)
Apr. 04, 2011	REPLY to Response in Opposition to Bill of Costs re 103 Bill of Costs, filed by United Parcel Service, Inc.. (Attachments: # 1 Exhibit 1)(Distler, Jill) Courtesy copy received submitted to Chambers. Modified on 4/6/2011 (ns, Deputy Clerk). (Entered: 04/04/2011)
Apr. 13, 2011	MOTION for Leave to File Sur-Reply in Opposition to Defendant's Bill of Costs by Peggy Young Responses due by 5/2/2011 (Attachments: # 1 Exhibit Proposed Sur-reply)(Gustafson, Sharon) (Entered: 04/13/2011)
Apr. 18, 2011	RESPONSE in Opposition re 111 MOTION for Leave to File Sur-Reply in Opposition to Defendant's Bill of Costs filed by United Parcel Service,

	Inc.. Replies due by 5/5/2011. (Attachments: # 1 Supporting Memorandum) (Distler, Jill) (Entered: 04/18/2011)
May 05, 2011	REPLY to Response to Motion re 111 MOTION for Leave to File Sur-Reply in Opposition to Defendant's Bill of Costs filed by Peggy Young. (Gustafson, Sharon) (Entered: 05/05/2011)
Aug. 09, 2011	MEMORANDUM OPINION. Signed by Chief Judge Deborah K. Chasanow on 8/9/11. (sat, Chambers) (Entered: 08/09/2011)
Aug. 09, 2011	ORDER DENYING 101 motion for reconsideration, GRANTING 111 motion for leave to file a sur-reply to Defendants bill of costs, and DIRECTING the Clerk of Court to detach and file Exhibit 1 to ECF No. 111 as a surreply to Defendants bill of costs. Signed by Chief judge Deborah K. Chasanow on 8/9/11. (sat, Chambers) (Entered: 08/09/2011)
Aug. 09, 2011	SURREPLY re 103 Bill of Costs, flied by Peggy Young. (ns, Deputy Clerk) (Entered: 08/09/2011)
Aug. 26, 2011	MOTION for Extension of Time to File Notice of Appeal by Peggy Young Responses due by 9/12/2011 (Gustafson, Sharon) (Entered: 08/26/2011)
Aug. 30, 2011	RESPONSE to Motion re 117 MOTION for Extension of Time to File Notice of Appeal filed by United Parcel

	Service, Inc.. Replies due by 9/16/2011. (McGee, Emmett) (Entered: 08/30/2011)
Aug. 30, 2011	ORDER GRANTING 117 Motion for Extension of Time to file Notice of Appeal. Plaintiff's time to notice an appeal is extended to 10/7/2011. Defendant's memorandum in support of its motion for attorneys' fees is now due no earlier than 10/21/2011 or, if Plaintiff notes an appeal, 14 days after the issuance of the mandate of the Court of Appeals. Signed by Chief Judge Deborah K. Chasanow on 8/30/11. (sat, Chambers) (Entered: 08/30/2011)
Oct. 06, 2011	NOTICE OF APPEAL by Peggy Young (Filing fee $ 455.00, receipt number 84637017954) (krc, Deputy Clerk) (Entered: 10/06/2011)
Oct. 06, 2011	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 120 Notice of Appeal. IMPORTANT NOTICE: To access forms which you are required to file with the United States Court of Appeals for the Fourth Circuit please go to http://www.ca4.uscourts.gov and click on Forms & Notices. (krc, Deputy Clerk) (Additional attachment(s) added on 10/6/2011: # 1 Transmittal Sheet) (krc, Deputy Clerk). (Entered: 10/06/2011)
Oct. 06, 2011	USCA Case Number 11-2078 for 120 Notice of Appeal filed by Peggy Young.

	Case Manager – Amy L. Carlheim (rss, Deputy Clerk) (Entered: 10/06/2011)
Oct. 28, 2011	Clerk's Order denying the Taxing Costs without prejudice to Defendant filing a new bill of costs in this case (ranks, Deputy Clerk) (Entered: 10/28/2011)
Jan. 09, 2013	JUDGMENT of USCA "AFFIRMING" the Judgment of the USDC as to 120 Notice of Appeal filed by Peggy Young. This judgment shall take effect upon issuance of this courts mandate in accordance with Fed. R. App. P. 41. (Attachments: # 1 Published Opinion, # 2 Notice of Judgment)(krc, Deputy Clerk) (Entered: 01/10/2013)
Jan. 31, 2013	MANDATE of USCA takes effect today as to 120 Notice at Appeal filed by Peggy Young (krc, Deputy Clerk) (Entered: 01/31/2013)
Feb. 14, 2013	BILL OF COSTS by United Parcel Service, Inc.. Replies due by 3/4/2013. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Memorandum in Support, # 4 Affidavit)(Distler, Jill) Courtesy copy received – submitted to chambers. Modified on 2/15/2013 (nss, Deputy Clerk). (Entered: 02/14/2013)
Feb. 25, 2013	MOTION for Extension of Time to File Memorandum in Opposition to Bill of Costs by Peggy Young Responses due by 3/14/2013 (Gustafson, Sharon) (Entered: 02/25/2013)

Feb. 26, 2013	RESPONSE in Opposition re 127 MOTION for Extension of Time to File Memorandum in Opposition to Bill of Costs filed by United Parcel Service, Inc.. Replies due by 3/15/2013. (Attachments: # 1 Memorandum in Support)(Distler, Jill) (Entered: 02/26/2013)
Mar. 07, 2013	REPLY to Response to Motion re 127 MOTION for Extension of Time to File Memorandum in Opposition to Bill of Costs filed by Peggy Young. (Gustafson, Sharon) (Entered: 03/07/2013)
Mar. 20, 2013	MEMORANDUM AND ORDER DENYING 127 Plaintiff's motion for extension of time to oppose bill of costs. Plaintiff's response in opposition to Defendant's Bill of Costs is now due on or before April 3, 2013. Signed by Chief Judge Deborah K. Chasanow on 3/20/13. (sat, Chambers) (Entered: 03/20/2013)
Apt 03, 2013	RESPONSE in Opposition re 126 Bill of Costs, filed by Peggy Young. Replies due by 4/22/2013. (Attachments: # 1 Affidavit)(Gustafson, Sharon) (Entered: 04/03/2013)
Apr. 22, 2013	REPLY to Response in Opposition to Bill of Costs re 126 Bill of Costs, filed by United Parcel Service, Inc. (Attachments: # 1 Exhibit 1)(Distler, Jill) Courtesy copy received – submitted to chambers. Modified on 4/23/2013 (nss, Deputy Clerk) (Entered: 04/22/2013)

June 03, 2013	Clerk's Order Taxing Costs. Costs are taxed in favor of Defendant United Parcel Service, Inc., and against Plaintiff Peggy Young, in the amount of $7,566.55 and included in the judgment. Motion to Review due by 6/10/2013. (jbp, Deputy Clerk) (Entered: 06/03/2013)
June 10, 2013	MOTION to Review the Clerk's Order Taxing Costs re 133 Clerk's Order Taxing Costs, by Peggy Young Responses due by 6/27/2013 (Gustafson, Sharon) (Entered: 06/10/2013)
June 13, 2013	RESPONSE in Opposition re 134 MOTION to Review the Clerk's Order Taxing Costs re 133 Clerk's Order Taxing Costs, filed by United Parcel Service, Inc.. Replies due by 7/1/2013. (Attachments: # 1 Exhibit 1)(Distler, Jill) Courtesy copy received – submitted to chambers. Modified on 6/17/2013 (nss, Deputy Clerk). (Entered: 06/13/2013)
Mar. 04, 2014	MEMORANDUM OPINION. Signed by Chief Judge Deborah K. Chasanow on 3/4/14. (sat, Chambers) (Entered: 03/04/2014)
Mar. 04, 2014	ORDER DENYING 134 motion for review of the clerk's order of taxation and AFFIRMING the Clerk's Taxation of Costs. Signed by Chief Judge Deborah K. Chasanow on 3/4/14. (sat, Chambers) (Entered: 03/04/2014)

Relevant Docket Entries for the United States Court of Appeals for the Fourth Circuit Docket for Case #: 11-2078

Filed	Docket Text
Oct. 06, 2011	Case docketed. Originating case number: 8:08-cv-02586-DKC. Case manager: ACarlheim. Date notice of appeal filed: 10/06/2011. [11-2078] (ALC)
Oct. 06, 2011	NOTICE ISSUED to Peggy Young requesting status of counsel. Mailed to: Peggy Young and Jill Schultz Distler. Status of Counsel due 10/17/2011. [11-2078] (ALC)
Oct. 17, 2011	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Sharon Fast Gustafson for Peggy Young.[998702085] [11-2078] Sharon Gustafson
Oct. 18, 2011	DOCKETING NOTICE issued Re: ,case docketed. Initial forms due within 14 days. Originating case number: 8:08-cv-02586-DKC. [11-2078] (ALC)
Oct. 20, 2011	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Emmett F. McGee, Jr. for UPS.[998705080] [11-2078] Emmett McGee
Oct. 20, 2011	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Jill S. Distler for UPS.[998705105] [11-2078] Jill Distler
Oct. 20, 2011	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by

	Appellee UPS. Was any question on Disclosure Form answered yes? Yes [998705155] [11-2078] Jill Distler
Nov. 01, 2011	DOCKETING STATEMENT by Appellant Peggy Young. [11-2078] Sharon Gustafson
Nov. 01, 2011	BRIEFING ORDER filed. Opening Brief and Appendix due 12/12/2011. Response Brief due 01/13/2012. [11-2078] (ALC)
Nov. 02, 2011	DOCKETING FORMS FOLLOW-UP NOTICE ISSUED to Appellant Peggy Young re: filing of disclosure form (Loc.R. 26.1). Disclosure statement due from Peggy Young on 11/14/2011. [11-2078] (ALC)
Nov. 02, 2011	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by Appellant Peggy Young. Was any question on Disclosure Form answered yes? No [998714598] [11-2078] Sharon Gustafson
Nov. 10, 2011	DESIGNATION OF LEAD COUNSEL (Local Rule 12(b)) by Appellee UPS. Name of lead counsel: Emmett F. McGee, Jr.. [11-2078] Jill Distler
Nov. 10, 2011	Initial mediation conference scheduled. [11-2078] (LP)
Nov. 10, 2011	OBJECTION to DOCKETING STATEMENT by Appellee UPS. [11-2078] Jill Distler

Dec. 07, 2011	ORDER filed [998737939] updating briefing order deadlines. Opening brief and appendix due 01/31/2012. Response brief due 03/21/2012. Copies to all parties. [11-2078] (ALC)
Jan. 18, 2012	ORDER filed [998766980] rescinding briefing schedule. Copies to all parties. [11-2078] (ALC)
Jan. 18, 2012	BRIEFING ORDER filed – FRAP 30(c) Schedule. Page-Proof Opening Brief due: 02/27/2012. Page-Proof Response Brief due: 04/02/2012. Appendix under FRAP 30(c) due: 04/17/2012. All Briefs in Final Form due 13 days after FRAP 30(c) Appendix served. [11-2078] (ALC)
Jan. 25, 2012	ORDER filed [998772553] updating Rule 30(c) briefing order deadlines. Page-Proof Opening Brief remains due: 02/27/2012. Page-Proof Response Brief now due: 04/09/2012. Appendix under FRAP 30(c) now due: 05/04/2012. All Briefs in Final Form now due 05/17/2012. Copies to all parties. [11-2078] (ALC)
Feb. 07, 2012	MOTION by Appellant Peggy Young to exceed length limitations for brief. Date and method of service: 02/07/2012 ecf [998783328] [11-2078] Sharon Gustafson
Feb. 08, 2012	Docket correction requested from Ms. Sharon Fast Gustafson for Peggy Young Re: Motion to exceed length

	limitations. Supplement to motion due 02/10/2012. [11-2078] (ALC)
Feb. 08, 2012	MOTION – ENTRY STRUCK. [11-2078] – [Edited 02/08/2012 by ALC] Sharon Gustafson
Feb. 08, 2012	Supplemental MOTION by Appellant Peggy Young to exceed length limitations for brief. Date and method of service: 02/08/2012 ecf [998784290] [11-2078] Sharon Gustafson
Feb. 08, 2012	NOTICE ISSUED to Jill Schultz Distler and Emmett F. McGee, Jr. for UPS requesting response to Motion to exceed length limitations . Response due: 02/21/2012.[998784309]. [11-2078] (ALC)
Feb 16, 2012	RESPONSE/ANSWER by UPS to notice requesting response . Nature of response: in opposition. [11-2078] Jill Distler
Feb. 17, 2012	REPLY by Peggy Young to Response . [11-2078] Sharon Gustafson
Feb. 17, 2012	COURT ORDER filed . Copies to all parties. [11-2078] (ALC)
Feb. 22, 2012	MOTION by Appellant Peggy Young to exceed length limitations for brief. Date and method of service: 02/22/2012 ecf [998794175] [11-2078] Sharon Gustafson
Feb. 23, 2012	NOTICE ISSUED to Jill Schultz Distler and Emmett F. McGee, Jr. for UPS requesting response to

	Motion to exceed length limitations Response due: BY NOON 02/24/2012.[998794721]. [11-2078] (ALC)
Feb. 23, 2012	RESPONSE/ANSWER by UPS to notice requesting response . Nature of response: in opposition. [11-2078] Jill Distler
Feb. 24, 2012	COURT ORDER filed . Copies to all parties. [11-2078] (ALC)
Feb. 24, 2012	ORDER filed [998796126] extending Rule 30(c) briefing order deadlines. Page-Proof Opening Brief due: 03/02/2012. Page-Proof Response Brief due: 04/13/2012. Appendix under FRAP 30(c) due: 05/08/2012. All Briefs in Final Form due 05/21/2012. Copies to all parties. [11-2078] (ALC)
Feb. 28, 2012	MOTION by Appellant Peggy Young to exceed length limitations for brief. Date and method of service: 02/28/2012 ecf [998798133] [11-2078] Sharon Gustafson
Feb. 28, 2012	ORDER filed . Copies to all parties. [11-2078] (ALC)
Feb. 29, 2012	FRAP 30(c) PAGE-PROOF OPENING BRIEF – DOCUMENT STRUCK (See Final Version Filed 06/11/2012.) [11-2078] – [Edited 06/11/2012 by ALC] Sharon Gustafson
Mar. 05, 2012	MOTION by American Civil Liberties Union et al., Amici Curiae to file

	amicus curiae brief (FRAP 29(e)) without consent of all parties on appeal within time allowed by FRAP 29(e).. Date and method of service: 03/05/2012 ecf [998802365] [11-2078] Ariela Migdal
Mar. 05, 2012	AMICUS CURIAE/INTERVENOR BRIEF by American Civil Liberties Union et al., Amici Curiae in electronic and paper format. Type of Brief: Amicus Curiae. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 03/05/2012. [998802373] [11-2078] – [Attachment Material Struck 03/05/2012 by ALC – Counsel will refile with separate motion for leave to file the document] Ariela Migdal
Mar. 05, 2012	CERTIFICATE OF SERVICE by Potential Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland et al. Related documents: Motion to file amicus curiae brief [11-2078] Ariela Migdal
Mar. 05, 2012	NOTICE ISSUED to Jill Schultz Distler for UPS and Emmett F. McGee, Jr. for UPS requesting response to Motion to file amicus curiae brief . Response due: 03/19/2012.[998802547]. [11-2078] (ALC)

Mar. 05, 2012	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Ariela M. Migdal for American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland et al. [998802570] [11-2078] Ariela Migdal
Mar. 05, 2012	DISCLOSURE OF CORPORATE AFFILIATIONS (Local Rule 26.1) by Potential Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland. Was any question on Disclosure Form answered yes? No [998802578] [11-2078] Ariela Migdal
Mar. 09, 2012	MOTION by Potential Amicus Curiae American Civil Liberties Union Foundation et al for Motion for Leave to File an Attachment. Date and method of service: 03/09/2012 ecf [998806530] [11-2078] Ariela Migdal
Mar. 09, 2012	NOTICE ISSUED to Jill Schultz Distler for UPS and Emmett F. McGee, Jr. for UPS requesting response to Motion for leave to file an attachment. Response due: 03/22/2012.[998806549]. [11-2078] (ALC)
Mar. 19, 2012	RESPONSE/ANSWER by UPS to notice requesting response . Nature of response: in opposition. [11-2078] Jill Distler
Mar. 19, 2012	RESPONSE/ANSWER by UPS to notice requesting response . Nature

	of response: in opposition. [11-2078] Jill Distler
Mar. 19, 2012	ORDER filed . Attachment to brief due 03/29/2012. Copies to all parties. [11-2078] (ALC)
Mar. 19, 2012	AMICUS CURIAE BRIEF (PAPER) file-stamped, on behalf of American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland. Number of pages: [48]. Entered on Docket Date: 03/20/2012.[998813873] [11-2078] (ALC)
Apr. 10, 2012	MOTION by Appellee UPS to exceed length limitations for brief. Date and method of service: 04/10/2012 ecf [998829366] [11-2078] Jill Distler
Apr. 10, 2012	ORDER filed Copies to all parties. [11-2078] (ALC)
Apr. 10, 2012	MOTION by Amici Supporting Appellant American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland to extend filing time for Attachment to Brief Amici Curiae until 4/10/2012. Date and method of service: 04/10/2012 ecf [998830051] [11-2078] Ariela Migdal
Apr. 10, 2012	Addendum/attachment to amicus curiae Brief by Amici Supporting Appellant American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of

	Maryland in electronic and paper format. Method of filing paper copies: US Mail. Date copies mailed, dispatched, or delivered: 04/11/2012 [11-2078] Ariela Migdal
Apr. 11, 2012	ORDER filed Copies to all parties. [11-2078] (ALC)
Apr. 11, 2012	ADDENDUM/ATTACHMENT (PAPER) file-stamped on behalf of American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland. Number of pages: [42]. Entered on docket date: 04/11/2012.[998830554] [11-2078] (ALC)
Apr. 13, 2012	FRAP 30(c) PAGE-PROOF RESPONSE BRIEF – DOCUMENT STRUCK (See Final Version Filed 06/11/2012) [11-2078] Jill Distler
Apr. 30, 2012	MOTION by Appellant Peggy Young to exceed length limitations for reply brief. Date and method of service: 04/30/2012 ecf. [998843955] [11-2078] – [Docket Text Edited 05/01/2012 by ALC] Sharon Gustafson
Apr. 30, 2012	MOTION by Appellant Peggy Young to extend filing time for appendix until May 29, 2012. Date and method of service: 04/30/2012 ecf. [998843956] [11-2078] Sharon Gustafson
May 01, 2012	NOTICE ISSUED to Jill Schultz Distler and Emmett F. McGee, Jr. for UPS requesting response to Motion to

	exceed length limitations . Response due: 05/14/2012.[998814384] [11-2078] (ALC)
May 01, 2012	ORDER filed , updating/ resuming Rule 30(c) briefing order deadlines Appendix under FRAP 30(c) due: 05/29/2012. All Briefs in Final Form due 06/11/2012. Copies to all parties. [11-2078] (ALC)
May 14, 2012	RESPONSE/ANSWER by UPS to Motion to exceed length limitations . Nature of response: in opposition. [11-2078] Jill Distler
May 14, 2012	COURT ORDER filed Copies to all parties. [11-2078] (DHB)
May 16, 2012	MOTION by Appellant Peggy Young to exceed length limitations for reply brief, to extend filing time for reply brief until Tuesday, May 22, 2012. Date and method of service: 05/16/2012 ecf. [998855806] [11-2078] – [Docket Text Edited 05/16/2012 by ALC] Sharon Gustafson
May 16, 2012	MOTION – DUPLICATED ENTRY STRUCK [11-2078] – [Edited 05/16/2012 by ALC] Amending Entry [993855806] Sharon Gustafson
May 17, 2012	ORDER filed Copies to all parties. [11-2078] (ALC)
May 17, 2012	NOTICE ISSUED to Jill Schultz Distler and Emmett F. McGee, Jr. for UPS requesting response to Motion to

	exceed length limitations Response due: 05/22/2012.[998856576] [11-2078] (ALC)
May 22, 2012	RESPONSE/ANSWER by UPS to Motion to exceed length limitations . Nature of response: in opposition. [11-2078] Jill Distler
May 22, 2012	ORDER filed . Reply brief shall not exceed 7,600 words. Copies to all parties. [11-2073] (ALC)
May 29, 2012	NOTICE OF PAPER FILING by Appellant Peggy Young. Type of paper document filed: appendix Description: JA Vol IV of IV is sealed Date paper copies mailed, dispatched or delivered to court: 05/29/2012 Method of filing paper copies: hand delivery [11-2078] Sharon Gustafson
May 29, 2012	FRAP 30(c) APPENDIX (PAPER) file-stamped on behalf of Peggy Young. Sealed volume: Y. Total number of volumes (including any sealed): 4. Total number of pages in all volumes: 1977. Entered on Docket Date: 05/30/2012. [998863951] [11-2078] (ALC)
May 30, 2012	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by Peggy Young. Sealing Required: Yes. Description of document referenced by certificate: Joint Appendix Volume IV. [11-2078] Sharon Gustafson

May 30, 2012	ORDER filed [998863963] sealing appendix volume number IV. Copies to all parties. [11-2078] (ALC)
June 07, 2012	MOTION by Appellant Peggy Young file supplemental appendix.. Date and method of service: 06/07/2012 ecf. [998870800] [11-2078] Sharon Gustafson
June 11, 2012	BRIEF by Appellant Peggy Young in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/11/2012. [998872066] [11-2078] – [Document – Disclosure of Corporate Affiliations – Added 06/11/2012 by ALC] Sharon Gustafson
June 11, 2012	BRIEF by Appellant Peggy Young in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/11/2012. [998872069] [11-2078] Sharon Gustafson
June 11, 2012	NOTICE OF PAPER FILING by Appellant Peggy Young. Type of paper document filed: supplemental appendix Description: SJA Vol II of II is sealed Date paper copies mailed, dispatched or delivered to court: 06/11/2012 Method of filing paper copies: hand delivery [11-2078] – [Docket

	Text Edited 06/11/2012 by ALC] Sharon Gustafson
June 11, 2012	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by Peggy Young. Sealing Required: Yes. Description of document referenced by certificate: SJA V II of II is sealed. [11-2078] Sharon Gustafson
June 11, 2012	BRIEF by Appellee UPS in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/11/2012. [998872459] [11-2078] Jill Distler
June 11, 2012	ORDER filed . Copies to all parties. [11-2078] (ALC)
June 11, 2012	RESPONSE BRIEF (PAPER) file-stamped, on behalf of UPS. Number of pages: [81]. Sufficient: YES. Entered on Docket Date: 06/11/2012. [998872648] [11-2078] (ALC)
June 11, 2012	OPENING BRIEF (PAPER) file-stamped, on behalf of Peggy Young. Number of pages: [79]. Sufficient: YES. Entered on Docket Date: 06/11/2012. [998872752] [11-2078] (ALC)
June 11, 2012	SUPPLEMENTAL APPENDIX (PAPER) file-stamped on behalf of Peggy Young. Sealed volume: Y. Total number of volumes (including any sealed): 2. Total number of pages in all

volumes: 39. CD/DVD/Other exhibit? N. If yes, was it placed in brief box? N/A. Entered on Docket Date: 06/11/2012. [998872764] [11-2078] (ALC)

June 11, 2012 ORDER filed [998872770] sealing supplemental appendix volume II. Copies to all parties. [11-2078] (ALC)

June 11, 2012 REPLY BRIEF (PAPER) file-stamped, on behalf of Peggy Young. Number of pages: [42]. Sufficient: YES. Entered on Docket Date: 06/11/2012. [998872777] [11-2078] (ALC)

July 13, 2012 CASE TENTATIVELY CALENDARED for oral argument during the 10/23/12 10/26/12 argument session. Notify Clerk's Office of any scheduling conflict by: 07/23/2012 [11-2078] (JLC)

Aug. 15, 2012 CASE CALENDARED for oral argument. Date: 10/24/2012. Registration Time: 8:45 9:00. Daily Arguments Begin: 9:30. [11-2078] (JLC)

Aug. 15, 2012 ORAL ARGUMENT ACKNOWLEDGMENT by Appellee UPS. Counsel arguing: Emmett F. McGee, Jr. Answering argument time: 20 minutes [998916860] [11-2078] Emmett McGee

Aug. 20, 2012 ORAL ARGUMENT ACKNOWLEDGMENT by Amicus Supporting Appellant American Civil Liberties Union Foundation. Counsel arguing: Ariela Migdal (not arguing, but will attend) Opening argument time: Not

	seeking argument time [998919893] [11-2078] Ariela Migdal
Aug. 20, 2012	ORAL ARGUMENT ACKNOWLEDGMENT by Appellant Peggy Young. Counsel arguing: Sharon Fast Gustafson Opening argument time: 13 minutes Rebuttal argument time: 7 minutes [998920348] [11-2078] Sharon Gustafson
Sept. 05, 2012	APPEARANCE OF COUNSEL (Local Rule 46(c)) by Lenora Lapidus for American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Maryland et al. [998931487] [11-2078] Lenora Lapidus
Oct. 24, 2012	ORAL ARGUMENT heard before the Honorable J. Harvie Wilkinson, III, Roger L. Gregory and Allyson K. Duncan. Attorneys arguing case: Ms. Sharon Fast Gustafson for Appellant Peggy Young and Emmett F. McGee, Jr. for Appellee UPS. Courtroom Deputy: Kevin Burson. [998966895] [11-2078] (KB)
Jan. 09, 2013	PUBLISHED AUTHORED OPINION filed. Originating case number: 8:08-cv-02586-DKC Paper copies to all parties and the district court/agency. [999018667]. [11-2078] (DHB)
Jan. 09, 2013	JUDGMENT ORDER filed. Disposition method: 11-2078 opn.p.arg. Decision: Affirmed. Originating case number: 8:08-cv-02586-DKC. Entered

	on Docket Date: 01/09/2013. [999018673] Copies to all parties and the district court/agency. [11-2078] (DHB)
Jan. 31, 2013	Mandate issued referencing: Judgment order. Originating case number: 8:08-cv-02586-DKC. [11-2078] (ALC)
Apr. 11, 2013	SUPREME COURT REMARK – petition for writ of certiorari filed. 04/08/2013. 12-1226. [11-2078] (DHB)

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

In the Matter of:

Peggy S. Young
12715 Hoven Lane
Bowie, Maryland 20716
301-464-8585 (phone)

Charge No. 53107-2007-02213

v.

United Parcel Service
8440 Ardwick-Ardmore Road
Landover, Maryland 20706
301-386-8101 (phone)

Headquarters
55 Glen Lake
Parkway, N.E.
Atlanta, Georgia 30328

AMENDED CHARGE OF DISCRIMINATION

I, Peggy Young, amend my charge against United Parcel Service ("UPS") to include a charge of race discrimination, as I have learned that UPS permitted African-American pregnant employees to work while on pregnancy-related light-duty restriction, thereby discriminating against me on the basis of race. The remainder of my charge, first filed on July 23, 2007, is unchanged as follows:

UPS hired me on October 23, 1999. On January 25, 2002, I began working for UPS in Maryland. In August 2006, I took FMLA leave related to my conception of a child through IVF. On October 11, 2006, my doctor released me to return to work with a light-duty limitation of lifting not more than 20 pounds. However, UPS would not permit me to return for

light duty. The UPS nurse, Carol Martin, told me that I could not return to work for light duty to my pregnancy since light duty was not offered for that purpose. Male UPS employees who needed to work on a light duty status due to their physical limitations are permitted to work light duty. Very seldom did my regular position ever require me to lift over 20 pounds.

UPS discriminated against me on the basis of sex and pregnancy in violation of Title VII and Maryland law. ZUPS perceived me as disabled due to my pregnancy and light duty restriction and discriminated against me for that reason in violation of the Americans with Disabilities Act and Maryland law.

The company's treatment of me has caused me great distress. In addition, in January 2007, I learned that the company's decision not to permit me to return to work on light duty caused me to lose all of my health insurance benefits.

I have not commenced any action, civil, criminal or administrative, based on the above allegations, other than the original charge that I filed with the EEOC on July 23, 2007.

/s/ Peggy S Young
PEGGY S YOUNG

NOTARIZATION

PEGGY S. YOUNG, being first duly sworn, deposes and says that she is the Complainant herein; that she has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge. Subscribed and sworn to before me this 16 day of January 2008.

/s/ Kelly Anita Stewart
NOTARY PUBLIC
Registration No. 295330

My commission expires: 11/30/08.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff, v. UNITED PARCEL SERVICE OF AMERICA, INC., UNITED PARCEL SERVICE, INC., Defendants.	)	Civil Action No. DKC 08 CV 2586

FIRST AMENDED COMPLAINT

(Filed Oct. 29, 2008)

INTRODUCTION

1. The Plaintiff, Peggy Young, seeks damages and equitable relief from her employer for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*; for violations of the Americans with Disabilities Act, 42 U.S.C.12101 *et seq.*; and for violations of 42 U.S.C. § 1981 (as amended by the Civil Rights Act of 1991).

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter under 42 U.S.C. § 2000e-5(f), 42 U.S.C. 12117, and 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1988.

3. Venue herein is proper as these claims arose in substantial part within the State of Maryland.

PROCEDURAL REQUIREMENTS

4. On or about July 23, 2007, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Such charge was filed within 300 days after one or more of the alleged unlawful employment practices in violation of 42 U.S.C. § 2000e-2 had occurred.

5. On or about September 2, 2008, the EEOC issued Plaintiff a Notice of Right to Sue, giving Plaintiff 90 days from receipt of such notice to file her Complaint related to her Title VII claims and Disability discrimination claims.

PARTIES

6. Plaintiff Peggy Young is a caucasian female who is a citizen of the United States and a resident of the State of Maryland. She became an employee of United Parcel Service on or about October 23, 1999, and participated in its "UPS Health Program" At times relevant to this complaint she was employed as an early morning driver for UPS.

7. Defendant United Parcel Service, Inc., and United Parcel Service of America, Inc., (collectively referred to as "UPS") are corporations which, at all times relevant to this Complaint, have done business throughout the state of Maryland. Defendant is an employer within the meaning of all statutes relevant to this complaint, and is an employer of more than 500 employees.

8. Defendants maintain that United Parcel Service, Inc., is Plaintiff's employer.

9. United Parcel Service of America, Inc., and United Parcel Service, Inc., share the same corporate headquarters campus and legal office at 55 Glenlake Parkway, NE, Atlanta, Georgia 30328.

BACKGROUND FACTS

10. In or about the summer of 2005, Ms. Young and her husband were attempting a pregnancy through in vitro fertilization ("IVF"). Ms. Young was out of work on leave related to this pregnancy attempt.

11. In or about October 2005, Ms. Young suffered a miscarriage and returned to work. Ms. Young thereafter had a second round of IVF treatments that were not successful.

12. On or about July 15, 2006, Ms. Young went on unpaid leave in preparation for an eventually successful IVF process which resulted in a second pregnancy and the birth of Ms. Young's daughter on April 29, 2007.

13. During Ms. Young's absence related to her IVF attempts, she spoke with her supervisor and her manager about the IVF cycle and about what UPS needed from her doctor in order for Ms. Young to keep her employment and benefits. Ms. Young's supervisor explained to Ms. Young that UPS would need a doctor's note explaining her "restrictions".

14. On October 11, 2006, when Ms. Young was ready to return to work at UPS, Ms. Young's obstetrician's office at the National Naval Medical Center gave Ms. Young a note To Whom It May Concern that stated:

> Peggy Young is currently pregnant and due to deliver on or about May 2, 2007. Due to her pregnancy it is recommended that she not lift more than 20 pounds.

15. Ms. Young gave the note referred to in the preceding paragraph to UPS Occupational Health Manager Carol Martin as she had been instructed by her supervisor to do. Ms. Young explained that her doctor had told her she could return to work but that he recommended that she not lift more than 20 pounds.

16. In the conversation referred to in the preceding paragraph, Ms. Martin told Ms. Young that Ms. Martin did not know what to do with Ms. Young. Ms. Martin told Ms. Young that she could not come back to work during her pregnancy. Ms. Martin also told Ms. Young that she was not qualified to receive disability benefits because she was not disabled under the terms of the UPS Health Plan, but that she could not work because there was no light duty available for pregnancy. Ms. Martin also said that Ms. Young might want to think about her employment with UPS since she had used up all of her FMLA leave. Ms. Young understood Ms. Martin to be

advising Ms. Young to quit her employment with UPS due to her pregnancy.

17. Ms. Young explained to Ms. Martin that she needed and wanted to come back to work and that she believed she was able to perform her regular job at UPS.

18. Ms. Young also called her supervisor, Ursla, to inform her about her readiness to return to work and about the October 11 doctor's note. Ms. Young explained that she was able to work, but that her doctor had recommended that she not lift over 20 pounds. Ursla told Ms. Young that she would find out if there was any other work she could do in the building and call her back. However, Ursla never called Ms. Young back and did not return several calls that Ms. Young left for Ursla in an attempt to follow up on this conversation.

19. In early November 2006, Ms. Young went to her worksite and spoke with Myron Williams who was the manager of UPS business at that worksite. Ms. Young explained to Mr. Williams that she was pregnant and that her doctor had recommended that she not lift more than 20 pounds, but that she was willing and able to work. She explained that it was important to her not to lose her benefits. She offered to continue to do her regular job or to be moved to a desk job. Mr. Williams told Ms. Young UPS did not want Ms. Young back in the building until she was no longer pregnant because she was too much of a liability.

20. Throughout Ms. Young's conversations with the UPS Occupational Health Manager, and her supervisor, and Mr. Williams, Ms. Young maintained that she would not have trouble performing her regular position because she was almost never called upon to lift anything over a few pounds – much less 20 pounds – in that position. She also said that, should the rare occasion arise where she had a delivery over 20 pounds, she would be able to make alternative arrangements with her co-workers for the delivery of the heavy package, as others have done from time-to-time for a variety of reasons, or she would be able to deliver the package herself. Ms. Young repeatedly stated her ability and willingness to perform her job and her need to work during her pregnancy. However, UPS would not allow her to work during her pregnancy.

21. From October 11, 2006, through June 26, 2007, Ms. Young lost all of her UPS wages and benefits for herself and her family, including medical, dental, and disability benefits, because UPS would not permit her to work due to her pregnancy.

22. On April 29, 2007, Ms. Young gave birth to her daughter.

23. On June 26, 2007, Ms. Young returned to work at UPS.

ADDITIONAL FACTS RELEVANT TO ADA CLAIM

24. UPS regarded Ms. Young as having a disability even though Ms. Young never claimed to have a disability.

25. UPS classified Ms. Young as being out of work for "disability" during the period of time that it would not permit Ms. Young to work.

26. UPS wrongfully required Ms. Young to stay home from work because it regarded her as having a disability.

27. UPS discriminated against Ms. Young on the basis of the disability it regarded her as having when it refused to permit her to work due to her doctor's recommendation that she not lift more than 20 pounds.

ADDITIONAL FACTS RELEVANT TO TITLE VII AND ADA CLAIMS

28. Plaintiff realleges the facts set forth above.

29. UPS maintains a pattern of discrimination in employment on the basis of sex and race.

30. UPS has a requirement that early morning drivers – such as Ms. Young – must be able to lift 70 pounds.

31. As an early morning driver, Ms. Young's deliveries tended to be almost all lightweight envelopes of not more than a few pounds. She almost

never, if ever, was required to lift more than 20 pounds and almost never, if ever, was required to lift 70 pounds.

32. The 70-pound requirement for early morning drivers does not accurately measure one's ability to perform the job and is not a business necessity for the position.

33. The 70-pound requirement for early morning drivers operates to discriminate against women, particularly pregnant women, and it discriminated against Ms. Young when she was pregnant.

34. UPS legally was obliged to permit Ms. Young to decide whether to follow her doctor's recommendation related to the number of pounds she should lift, and was legally obliged not to insist that she quit work because of her doctor's recommendation that she not lift over 20 pounds during her pregnancy.

35. UPS discriminated against Ms. Young on the basis of her pregnancy and/or related medical conditions and/or perceived disability when it refused to permit her to work due to her doctor's recommendation that she not lift more than 20 pounds.

36. UPS fails and refuses to treat "disabilities" caused by pregnancy on the same terms that it provides leave time and benefits for "disabilities" caused by other conditions.

37. The foregoing acts of Defendant UPS discriminated against Ms. Young because of her sex with

malice and reckless indifference to her rights under Title VII of the Civil Rights Act of 1964, as amended.

ADDITIONAL FACTS RELEVANT TO RACE CLAIMS

38. Plaintiff realleges the facts set forth above.

39. UPS maintains a pattern of discrimination in employment on the basis of race.

40. In the UPS worksite where Plaintiff is employed, the majority of the employees – unlike Peggy Young – are African-American.

41. Supervisors and managers at UPS enforce the no-light-duty rule against those they wish to enforce it against, and make exceptions to it for those for whom they wish to make exceptions, in a way that discriminates against employees on the basis of race.

42. UPS would not permit Ms. Young, a caucasian female, to go on light duty during her pregnancy. However, in a close period of time, UPS did permit an African-American female in the same department to go on light duty due to pregnancy.

43. UPS's rule about no light duty for pregnant women is not uniformly applied to employees regardless of their race.

44. UPS's decision to force Ms. Young to quit work during her pregnancy while permitting an African-American employee to go on light duty during her pregnancy was intentional discrimination against

Ms. Young, with malice and reckless indifference to her rights under Section 1981 and Title VII.

PRAYER FOR RELIEF

45. Plaintiff suffered and continues to suffer damages including lost wages and benefits, and great emotional distress.

46. As a direct and proximate result of the Defendant's breaches of Title VII, the Americans with Disabilities Act, and Section 1981, Plaintiff has been caused to incur attorney's fees.

WHEREFORE, Plaintiff demands judgment against the Defendants and prays that this Court enter a judgment:

- declaring that the acts and practices complained of herein are in violation of Title VII, and/or the Americans with Disabilities Act, and/or Section 1981;
- awarding Plaintiff under Title VII, and/or the Americans with Disabilities Act, and/or Section 1981 the pay and fringe benefits she has lost as a result of Defendant UPS's unlawful discrimination against her;
- awarding Plaintiff under Title VII, and/or the Americans with Disabilities Act, and/or Section 1981 compensatory and punitive damages in an amount to be determined at trial;

- awarding Plaintiff pre-judgment and post-judgment interest;
- awarding Plaintiff the costs of this action, together with reasonable attorney's fees; and
- granting such other and further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury of any issues triable by jury.

/s/

Sharon Fast Gustafson
Counsel for Plaintiff
4041 N. 21st Street
Arlington, Virginia 22207-3040
(703) 527-0147 Telephone
(703) 527-0582 telefacsimile
sf.gustafson@verizon.net

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG **Plaintiff,** **vs.** **UNITED PARCEL SERVICE OF AMERICA, INC., et al.,** **Defendants.**	**Civil Action No. DKC 08 CV 2586**

DEFENDANTS' ANSWER TO FIRST AMENDED COMPLAINT

(Filed Dec. 8, 2008)

Defendants United Parcel Service, Inc. (hereinafter also referred to as "UPS") and United Parcel Service of America, Inc. (hereinafter also referred to as "UPSOA")[1], by their counsel, in answer to the First Amended Complaint filed on behalf of Plaintiff Peggy Young (hereinafter referred to as "Young" or "Plaintiff"), say as follows:

FIRST DEFENSE

The First Amended Complaint fails to state a claim upon which relief can be granted against Defendants.

---

[1] United Parcel Service, Inc. and United Parcel Service of America, Inc. are referred to collectively as "Defendants."

SECOND DEFENSE

All actions taken with respect to Plaintiff were based on, and because of, reasons unrelated to Plaintiff's medical condition, pregnancy, gender or race, and Plaintiff was not in any way discriminated against.

THIRD DEFENSE

Plaintiff's claims are barred, in whole or in part, by Plaintiff's failure to file timely a charge with the EEOC and her failure otherwise to exhaust administrative procedures and satisfy all prerequisites to suit.

FOURTH DEFENSE

Plaintiff was not an employee of United Parcel Service of America, Inc., and Plaintiff has no basis for any claim against United Parcel Service of America, Inc.

FIFTH DEFENSE

Plaintiff's claims are barred to the extent she seeks to challenge conduct that did not result in any adverse employment action or otherwise is not actionable.

SIXTH DEFENSE

Plaintiff's claims are barred to the extent she seeks damages in excess of the caps on damages under applicable law.

SEVENTH DEFENSE

Plaintiff's claims and requests for relief are barred because the conduct alleged in the First Amended Complaint is contrary to Defendants' good faith efforts to comply with the law, including Title VII, the ADA and other civil rights and employment discrimination laws.

EIGHTH DEFENSE

Plaintiff's claims are barred by *res judicata* and/or collateral estoppel.

NINTH DEFENSE

Plaintiff's claims are barred, in whole or in part, because Defendants at all times acted in good faith and without malice or any intent to cause any harm to Plaintiff.

TENTH DEFENSE

The claims asserted in the First Amended Complaint are barred, in whole or in part, by the applicable statute of limitations.

ELEVENTH DEFENSE

The claims asserted in the First Amended Complaint are barred, in whole or in part, by the doctrines of waiver and estoppel.

TWELFTH DEFENSE

Plaintiff's claims are barred by the doctrine of accord and satisfaction.

THIRTEENTH DEFENSE

The claims asserted in the First Amended Complaint are barred, in whole or in part, because Plaintiff failed to exercise reasonable care and diligence to mitigate damages and/or back-pay losses, if any. In addition, Plaintiff's damages and/or back-pay losses, if any, should be reduced by any and all interim earnings.

FOURTEENTH DEFENSE

Plaintiff was not regarded as having a disability within the meaning of the ADA.

FIFTEENTH DEFENSE

The claims asserted in the First Amended Complaint are barred to the extent they exceed the scope of the claims asserted in the administrative charge filed with the EEOC.

SIXTEENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by Plaintiff's failure to cooperate with the EEOC, her failure to provide the EEOC with requested information, and her failure otherwise to exhaust administrative procedures and satisfy all prerequisites to suit.

SEVENTEENTH DEFENSE

Plaintiff's claims are barred because Plaintiff did not suffer any damages or injury proximately caused by any act by, or attributable to, Defendants.

EIGHTEENTH DEFENSE

The claims asserted in the First Amended Complaint are barred, in whole or in part, because for completely legitimate, nondiscriminatory reasons the challenged employment actions would have been taken in any case.

NINETEENTH DEFENSE

To the extent, if any, a Plaintiff has suffered any damages and/or losses, which Defendants deny, such damages or losses were the result of, and caused by, Plaintiff's own conduct and/or omissions.

TWENTIETH DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

TWENTY-FIRST DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

TWENTY-SECOND DEFENSE

Plaintiff lacks standing to assert one or more of the claims alleged in the First Amended Complaint.

TWENTY-THIRD DEFENSE

Plaintiff was not a qualified person with a disability within the meaning of the ADA.

TWENTY-FOURTH DEFENSE

Subject to, and without waiving, the foregoing defenses, Defendants further respond to the specific allegations contained in the numbered paragraphs of the First Amended Complaint:

Introduction

1. With respect to the other allegations contained in Paragraph 1 of the First Amended Complaint, although the First Amended Complaint purports to assert claims under various statutes,

Defendants deny that Plaintiff has any valid or cognizable claim under those statutes.

Jurisdiction and Venue

2. Paragraph 2 of the First Amended Complaint contains legal conclusions to which no response is required.

3. Defendants admit that Plaintiff is employed by UPS in Maryland, and if there were any viable claims venue in this Court would be proper. Except as otherwise stated, the allegations contained in Paragraph 3 of the First Amended Complaint are denied.

Procedural Requirements

4. It is admitted that Plaintiff filed a charge of discrimination with the EEOC, but Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation concerning the date that the charge was filed. Except as otherwise stated, the allegations contained in Paragraph 4 of the First Amended Complaint are denied.

5. The allegations contained in Paragraph 5 of the First Amended Complaint are admitted.

Parties

6. The allegations contained in the first sentence of Paragraph 6 of the First Amended Complaint are admitted. Plaintiff was employed by UPS. Except

as otherwise stated, the allegations contained in Paragraph 6 of the First Amended Complaint are denied.

7. It is admitted that Defendants are corporations, and that UPS conducts business in the state of Maryland and employs more than 500 employees. Except as otherwise stated, the allegations contained in Paragraph 7 of the First Amended Complaint are denied.

8. In response to Paragraph 8 of the First Amended Complaint, it is admitted that Plaintiff is employed by UPS.

9. It is admitted that Defendants' principal places of business are located in Atlanta, Georgia. Except as otherwise stated, the allegations contained in Paragraph 9 of the First Amended Complaint are denied.

Background Facts

10. It is admitted that Plaintiff was absent from work for some period of time in 2005. Except as otherwise stated, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the First Amended Complaint.

11. It is admitted that after some period of absence, Plaintiff returned to work in 2005. Except as otherwise stated, Defendants are without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in Paragraph 11 of the First Amended Complaint.

12. It is admitted that Plaintiff was on leave commencing on or about July 2006. Except as otherwise stated, Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the First Amended Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 13 of the First Amended Complaint.

14. It is admitted that Plaintiff has produced a document dated October 11, 2006 that includes the statement quoted in Paragraph 14 of the First Amended Complaint. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning how or when Plaintiff received that document. Except as otherwise stated, the allegations contained in Paragraph 14 of the First Amended Complaint are denied.

15. It is admitted that at some time Carol Martin was informed that Plaintiff's physician had advised that Plaintiff had a lifting restriction. Except as otherwise stated, the allegations contained in Paragraph 15 of the First Amended Complaint are denied.

16. At some time, Carol Martin informed Plaintiff that she was not eligible to be transferred to a

different job assignment. Except as otherwise stated, the allegations contained in Paragraph 16 of the Amended Complaint are denied.

17. The allegations contained in Paragraph 17 of the Amended Complaint are denied.

18. The allegations contained in Paragraph 18 of the First Amended Complaint are denied.

19. It is admitted that at some time in 2006, Plaintiff and Myron Williams had a brief conversation at UPS. Except as otherwise stated, the allegations contained in Paragraph 19 of the First Amended Complaint are denied.

20. The allegations contained in Paragraph 20 of the First Amended Complaint are denied.

21. The allegations contained in Paragraph 21 of the First Amended Complaint are denied.

22. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph 22 of the First Amended Complaint.

23. The allegations contained in Paragraph 23 of the First Amended Complaint are admitted.

Additional Facts Relevant To ADA Claim

24. The allegations contained in Paragraph 24 of the First Amended Complaint are denied.

25. The allegations contained in Paragraph 25 of the First Amended Complaint are denied.

26. The allegations contained in Paragraph 26 of the First Amended Complaint are denied.

27. The allegations contained in Paragraph 27 of the First Amended Complaint are denied.

Additional Facts Relevant To Title VII And ADA Claim

28. In response to Paragraph 28 of the First Amended Complaint, Defendants adopt and incorporate herein the foregoing responses to the preceding paragraphs of the First Amended Complaint.

29. The allegations contained in Paragraph 29 of the First Amended Complaint are denied.

30. UPS employees are expected to perform the essential functions of their jobs. UPS complies with applicable law and provides reasonable accommodation to employees with disabilities where that is required by applicable law. Except as otherwise stated, the allegations contained in Paragraph 30 of the First Amended Complaint are denied.

31. A substantial percentage of the packages that Plaintiff typically delivered weighed less than 20 pounds. Except as otherwise stated, the allegations contained in Paragraph 31 of the First Amended Complaint are denied.

32. The allegations contained in Paragraph 32 of the First Amended Complaint are denied.

33. The allegations contained in Paragraph 33 of the First Amended Complaint are denied.

34. Paragraph 34 of the First Amended Complaint contains a conclusion of law to which no response is required. To the extent that Paragraph 34 of the First Amended Complaint contains any allegations of fact, they are denied.

35. The allegations contained in Paragraph 35 of the First Amended Complaint are denied.

36. The allegations contained in Paragraph 36 of the First Amended Complaint are denied.

37. The allegations contained in Paragraph 37 of the First Amended Complaint are denied.

Additional Facts Relevant To Race Claim

38. In response to Paragraph 38 of the First Amended Complaint, Defendants adopt and incorporate herein the foregoing responses to the preceding paragraphs of the First Amended Complaint.

39. The allegations contained in Paragraph 39 of the First Amended Complaint are denied.

40. UPS employs individuals of all races, including African-American employees. To the extent that Paragraph 40 of the First Amended Complaint suggests that UPS discriminates against any employees on the basis of race, that is denied.

41. The allegations contained in Paragraph 41 of the First Amended Complaint are denied.

42. The allegations contained in Paragraph 42 of the First Amended Complaint are denied.

43. The allegations contained in Paragraph 43 of the First Amended Complaint are denied.

44. The allegations contained in Paragraph 44 of the First Amended Complaint are denied.

Prayer For Relief

45. The allegations contained in Paragraph 45 of the First Amended Complaint are denied.

46. The allegations contained in Paragraph 46 of the First Amended Complaint are denied.

TWENTY-FIFTH DEFENSE

Defendants deny that Plaintiff is entitled to any of the relief requested in the First Amended Complaint, or to any other relief.

TWENTY-SIXTH DEFENSE

Defendants intend to rely on such other defenses that may become available or apparent during the course of discovery in this case. Defendants expressly reserve the right to amend this Answer to assert any and all such defenses.

RESPONSE TO PLAINTIFF'S PRAYER FOR JURY TRIAL

Defendants object to Plaintiffs' prayer for a jury trial with respect to any claim, issue or element of relief with respect to which Plaintiff is not entitled to a jury trial as a matter of right.

WHEREFORE, having answered the First Amended Complaint, Defendants request this action be dismissed with prejudice, that they be awarded the costs and attorneys' fees incurred in defending this action, and that they be awarded such other and further relief as the Court deems appropriate.

Respectfully submitted,

/s/

Emmett F. McGee, Jr.
(Federal Bar No. 08462)
Jill S. Distler
(Federal Bar No. 26166)
Eric L. Sherbine
(Federal Bar No. 28570)

DLA PIPER LLP (US)
6225 Smith Avenue
Baltimore, Maryland 21209-3600
phone (410) 580-3000
facsimile (410) 580-3001

Attorneys for Defendants

[Certificate Of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff, vs. UNITED PARCEL SERVICE, INC., Defendant.	)	C.A. DKC 08 CV 2586

The deposition of CAROLYN MARTIN was taken on Wednesday, April 1, 2009, commencing at 1:35 p.m., at the offices of Sharon Fast Gustafson, Esquire, 4041 North 21st Street, Arlington, Virginia, before Paula L. Lowery, Notary Registration No. 162073, Notary Public.

* * *

[40] BY MS. GUSTAFSON:

Q. To your knowledge, these employees who fail to pass the DOT test for a commercial driver's license, what sorts of inside jobs are they given?

THE WITNESS:

A. Typically, they would work on either the preload or the local sort, carwash. Inside operations.

* * *

[61] Q. Other than that, is there any other category of person that you're aware of who sometimes is unable to perform their jobs as a UPS provider?

A. Yes.

Q. Who would that be?

[62] A. There are drivers who have medical conditions that are not work-related, and because of those medical conditions, they are not able to perform their jobs as drivers.

Q. What sort of medical conditions?

A. Many. You could have someone who was hurt playing sports and can't drive due to – for whatever reason, so they wouldn't be able to perform their regular job.

You could have someone who has had emotional stress perhaps and was – because of the emotional issues they were going through, their doctor may have taken them off work. That may have prevented them from driving. You could have – you want me to keep speculating?

Q. No, I don't want you to speculate. Let's limit it to actual situations in your experience where a UPS employee has not been able to work for these reasons.

The sports injury, how often does that happen typically in a year?

A. That could happen fairly frequently to a [63] driver where the driver – if they were out playing basketball or baseball or skiing.

Q. But my question is how often has it happened at UPS, in your experience, typically in a year?

A. I don't know, to be honest. I don't have those – I don't know.

Q. Would those people be referred to you?

A. Full-time drivers who are injured or ill. Typically, I don't speak to every one of those employees. They call the union because their short-term disability would come through Local 639.

Q. Has it ever happened – the situation you're talking about – emotional distress where the doctor takes them off work for a while?

A. Yes, I've seen that happen.

Q. How many times typically does that happen in a year?

A. Four or five times a year.

Q. These are people who have emotional distress that doesn't qualify under the ADA?

[64] A. Correct, yes.

Q. But that sports injury or emotional distress might also keep them from passing a DOT test; is that correct?

A. If they went to a DOT doctor, yes, it could.

Q. Are there any other categories other than what you've named where you actually see people at UPS unable to perform their driving job for some time?

A. People who have surgery, all different types of surgery, who are temporarily disqualified for any length of time depending on the type of surgery that they have.

Q. Okay.

A. Pregnancies.

Q. How often do you see that in a year?

A. How often do I see –

Q. Somebody at UPS who is temporarily disqualified from their driving job due to pregnancy or a pregnancy-related condition?

MR. McGEE: Wait, can you clarify the [65] question? Hardly anybody continues to work on the day they actually give birth, so what are you talking about now?

MS. GUSTAFSON: I'm not talking about childbirth. I'm talking about pregnancy or pregnancy-related conditions not including childbirth.

MR. McGEE: What does that mean? Up to the day of delivery is considered pregnancy, not childbirth?

MS. GUSTAFSON: I'm asking the questions. Please do not say you do not understand the question. It doesn't matter if you don't understand the question. The deponent needs to understand the question. If she doesn't understand, she can ask me for a clarification.

MR. McGEE: Objection. The question is inscrutable, and a question nobody could answer, but I'm sure you could reform the question in a way that is understandable and can be answered.

THE WITNESS: When a female driver is going to have a child, they typically need to be [66] out of work for some period of time. I mean, you don't have a child and come back the next day.

So six weeks, if they have their baby, if it's a C-section – sometimes it depends on the type of delivery.

BY MS. GUSTAFSON:

Q. How many times in a year do you see a woman UPS service provider who is temporarily unable to perform her driver's job for some reason related to the pregnancy or pregnancy-related condition, not including childbirth, prior to the birth of the child?

A. Say that one more time. I'm sorry.

MS. GUSTAFSON: Please read back the question.

(The record was read as requested.)

THE WITNESS: I don't know. Not often. I can't give you an exact number.

BY MS. GUSTAFSON:

Q. I know you can't give me an exact number, and as we've said for these other things where you can't give me exact numbers, I'm just trying to [67] understand if we're talking about a handful of times or a hundred times, some other number. As best you know, typically, in a year.

A. I guess I would say a handful, not hundreds.

Q. Are these typically employees who come in with lifting restrictions, or is it other things that makes them unable temporarily to drive?

A. From my experience, typically, it would be lifting restrictions. There have been other kinds – other complications of pregnancy.

Q. What are the other restrictions that are pregnancy-related that sometimes come up, besides lifting restrictions?

A. Someone might have breakthrough bleeding.

Q. Typically, what sort of restriction would the medical provider be putting on them?

A. I've seen female drivers who have had complications like that where they've had a temporary restriction, maybe bed rest for two weeks, or could even be no lifting for a couple of weeks. But then once they were cleared medically, [68] they were able to

come back and do their regular job. Just another scenario.

Q. Any other temporary conditions that we haven't already talked about that would take a UPS service provider out of their driving job for a period of time?

A. Other medical illnesses. Could be somebody might have pneumonia and perhaps can't work for a couple of weeks. So any sort of medical-related illness or injury that is not work-related, male or female, would have that person out of work for a temporary period.

Q. How many times in a year, typically, do you have somebody – maybe you've already answered this question, but I'm not sure so I want to clarify. How many times in a year do you have somebody come in requesting some work that would involve a lifting restriction due to pregnancy?

MR. McGEE: Requesting work that relates to a lifting restriction? Can you clarify?

BY MS. GUSTAFSON:

Q. Do you understand the question? [69] Approximately how many times in a year do you have a UPS employee come in with some restriction from their doctor, or recommendation about a restriction from a doctor, that would limit the amount of lifting they could do?

MR. McGEE: Are you talking about drivers now?

BY MS. GUSTAFSON:

Q. You can answer generally for all employees first.

A. Are you talking about pregnancy-related –

Q. Yes.

A. – restrictions only?

Q. Yes.

A. And are you only talking about drivers?

Q. No.

A. I have another population.

Q. All the employees first.

A. Again, probably a handful that I'm aware of.

Q. Am I correct that none of these pregnant [70] employees were given temporary alternative work when they have such a restriction from their doctor?

A. That would be correct.

* * *

[78] Q. What does Peggy say when she calls?

A. Peggy said that she was pregnant and the in vitro fertilization had been successful. She had been on FMLA for that, and I congratulated her. I was happy for her.

Q. That's the extent of that conversation?

A. No, it's not the extent of it.

Q. Okay. Keep going. Then what? You congratulated her – as best you can remember, what was the rest of that conversation?

A. Peggy said she had a note from her doctor that prevented her from lifting anything greater than 20 pounds from now – from the time she had gotten pregnant to the end of her pregnancy; that she would have a lifting restriction, that it was going to be something that wouldn't be lifted [79] during the pregnancy.

Q. What did you say?

A. I told Peggy that she could not continue to work, unfortunately, as a driver because her driving job required her to lift more than 20 pounds.

Q. Did you say anything else?

A. Well, Peggy was not happy to hear that news.

Q. What did she say to let you know she wasn't happy?

A. She said she wanted to continue working, and I advised her that, you know, I would love to allow her to work, but she had exhausted FMLA at this point. She was very early on in her pregnancy. She had lifting restrictions.

Based on company policy, I, unfortunately, could not allow her to continue working with her 20-pound lifting restriction.

Q. Did she say anything else?

A. Then she was not happy with me, and again, told me she wanted to work. I empathized [80] with her situation, but I let Peggy know that there was, unfortunately, nothing I could do to allow her to continue working because she had the lifting restriction.

I needed to treat her like I would treat anybody who had a note for lifting and couldn't do their regular job. That I could only offer light duty in work-related situations.

Q. Did she say anything else, or did you say anything else?

A. I don't know.

Q. Do you remember her telling you that she hardly ever had to lift more than 20 pounds in her job, if ever?

A. She may have. I don't know if she told me that specifically.

Q. Do you remember her telling you that there was another employee who had volunteered to move anything heavier than 20 pounds if it needed to be?

A. No, I don't recall that.

Q. Do you recall her saying she was willing [81] to do either light duty or her regular job?

A. She may have said that; I'm not sure whether she did in that conversation or not, but it really wasn't relevant because I couldn't offer it to her. But to tell you whether she said that in that conversation, I can't be sure.

STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG,	)	
Plaintiff,	)	
vs.	)	CA DKC 08cv2586
UNITED PARCEL SERVICE, INC.,	)	
Defendant.	)	

* * *

ORIGINAL

The deposition of CAROL K. RICHARDSON was taken on Wednesday, June 10, 2009, commencing at 10:13 a.m. at the offices of Sharon Fast Gustafson, Attorney, 4041 North 21st Street, Arlington, Virginia before Paula L. Lowery, Notary Registration No. 162073, Notary Public.

* * *

[27] BY MS. GUSTAFSON:

A. No.

MS. RICHARDSON:

Q. Was it –

A. Like I said, I was in school, so that was fall of that year.

Q. Do you know which trimester of the pregnancy you were in? The first, the second, or the third?

A. No.

Q. Do you remember if you were out on disability for weeks before the birth or months before the birth?

A. I guess it was a couple of months.

Q. Did you ask anybody about why it was you needed to go on disability?

A. No.

Q. You were just told to do it so you did it, is that right?

A. Yeah. To keep your job, you'll do anything.

Q. Do you remember if you brought a doctor's note in for that pregnancy?

A. I always brought doctor's notes. UPS [28] requires doctor's notes for everything. Everything.

Q. When you brought a doctor's note in saying you were pregnant, who would you give it to?

MR. McGEE: Objection. Lack of foundation and in addition to the form of the question. There's been no testimony about what exactly the doctor's note said. You characterized it.

BY MS. GUSTAFSON:

Q. I'm not trying to characterize it. What does the doctor's note say?

A. That I was pregnant.

Q. When you brought in this doctor's note saying that you were pregnant, what did you do with it?

A. You gave it to your supervisor, whoever was in charge of you.

Q. Did you have an understanding during the pregnancies that we discussed of what UPS' policy was about when you could work and when you needed [29] to go on leave?

A. They never gave me any written policy or anything, but I was under the understanding you worked as long as you could. You just kept working.

Q. Do you know Peggy Young who's sitting here today?

A. Yes.

Q. How do you know her?

A. I work with her.

Q. How long have you worked with her?

A. Years. I don't know exactly how long, but years.

Q. Do you and she currently work together?

A. Yes.

Q. Doing what?

A. Delivering airs for early morning.

Q. Cici, in all those pregnancies that you had, did anybody ever tell you that you needed to go talk to the UPS health nurse?

A. Never.

Q. Did anybody ever tell you you needed to

* * *

[63] A. Night side has bins. They go out of the building. In the morning, they have bags or totes and they go directly to the drivers.

Q. Who lifts the bags?

A. I guess whoever is filling them, or whoever is doing it.

Q. I just want to make sure I'm picturing this correctly. Did you tell me before the baggers on the other side have to lift the bag?

A. At night they do.

Q. Explain that. The other side of what?

A. The other side of the belt. Like if it comes down – it's traveling down the belt. You'll have a secondary pick-off man or sorter, and they'll kick it off to whoever it goes to. You make sure it goes in that bag or tote. Like in the morning, they do it into totes. They drop it in the tote, and they put them on the belt.

Q. So the small sorters are not having to lift over 20 pounds, is that right?

A. It depends on the bags and the totes. The scanner people who are in front of them don't [64] have to touch anything.

Q. So some do, and some don't, is that correct?

A. Yes.

Q. What about the day call workers? Who are they?

A. I was a day call.

Q. What did you do as a day call worker?

A. Day call you just call the customer during the day. It's clerical.

Q. Did you have to lift over 20 pounds when you were a day call worker?

A. Sometimes, it depended. I mean – like what they tell me at UPS, if it's not safe, don't pick it up by yourself. So if I knew I couldn't pick it up, it would sit on the slide or the floor and somebody else would come and get it.

Q. Are there certain day call workers who just do smalls?

A. I want to say Mark, but I don't know how many air packages he has. He does EAMs. If there's something wrong with the airs and EAMs, he

* * *

[135] she became pregnant she gave any type of doctor's note ore release to anybody at UPS?

A. After she became pregnant?

Q. After she became pregnant.

A. After she became pregnant did she give a doctor's note to someone?

Q. That's my question.

A. That I don't know. All I know is they said, well, you can't work any more, and I lost her.

Q. Who said you can't work any more?

A. Jim Hale was there, Ursula was there, Harris was still there at one point, Bill Riggins was there. I don't know who she talked to or who she gave her notes to.

Carol Martin, evidently, was making the decisions, since she had told me they're not going to let me work; and I'm saying who's not letting you work? Well, Carol Martin's telling everybody I can't work.

Q. That's what Peggy Young is telling you?

A. Yeah.

* * *

[155] pregnancy?

Q. I'm talking about ever. Has there ever been a period of time when Peggy Young was not able to take packages between 20 and 70 pounds?

A. No, I've always taken the heavy stuff.

Q. I'm not asking what you did. I'm asking was there ever a period of time when Peggy Young was not able to take packages between 20 and 70 pounds?

A. When it was suggested with her doctor's note, that was the only time I know of.

Q. I want to get back to the job that you and Peggy Young were doing at the BWI Airport. After Peggy Young's vehicle was loaded –

MS. GUSTAFSON: What period of time?

MR. MCGEE: During the period of time that Peggy Young was working in a job that required her to go to the airport.

BY MR. MCGEE:

Q. Do you understand that's the period of time we're talking about?

A. Yes.

[156] Q. During that period of time, once the vehicles were loaded, what did Peggy Young's job then involve?

A. Delivery.

Q. She was required to deliver whatever packages were loaded into her vehicle?

A. Yes.

Q. Did Peggy Young ever have a bid route?

A. Not with me.

Q. Was far as you know, did Peggy Young ever have a bid route?

A. When she was an air driver at night I would assume she had the same route every night.

Q. At any time while Peggy Young was working as an EAM driver, did she ever have a bid route?

A. Does that mean the same area? EAM drivers – you have to get the concept. EAM drivers do not have bid routes like regular drivers. They are given an area, and they go – go, and they give you your packages.

So I would say, no, she does not have a bid route because she does one side of Annapolis, [157] or if it's heavier or something comes up and I'm not there, she does my side because she has more knowledge than the person who might be helping her.

So, no, she does not have a bid route.

Q. You're not there at work every day, are you?

A. I try to be.

Q. But you take vacations?

A. Sure.

Q. And you occasionally have a sick day?

A. Sure.

Q. Sometimes you'll take a personal day?

A. Yeah.

Q. So if you're not there, then who would take the heavier packages for Peggy Young?

A. Whoever was helping her if she needed the help.

Q. If they were willing to do it?

A. They don't have no choice.

Q. Why wouldn't they have a choice?

A. Because UPS policy you have to deliver.

[158] Q. But why wouldn't Peggy Young deliver those?

A. If she's over her capacity, or she cannot get to them on time, we are required to say, okay, I can do these eight, I can't do them – take them.

Q. Let's talk about a period of time when you and Peggy Young would start the day going to the airport to pick up packages off the airplanes. If you weren't there that day, and there was a 50 pound package that had to be delivered to either Anne Arundel County or Calvert County, Peggy Young would have to deliver that package, correct?

A. Correct.

MS. GUSTAFSON: Objection. She's already testified that she doesn't know that this ever happened during the pregnancy.

THE WITNESS: He's making the statement if I wasn't there, correct?

BY MR. MCGEE:

Q. Correct.

A. You're assuming –

* * *

[160] correct?

A. And she'd have to get help for it.

Q. Why would she have to get help for it?

A. Because it's policy. If you can't pick it up or it's oversize, you'd have to get help for it.

Q. Are you saying Peggy Young is not capable of picking up a 50 pound package?

A. I never said that. You said that.

Q. I'm just saying –

A. You just said that.

Q. I'm talking about a 50 pound package, okay? If that was to be delivered to Anne Arundel County or Calvert County on a day that you weren't there, Peggy Young would have to deliver that, correct?

A. I guess so. I'm going to –

MS. GUSTAFSON: Ask for a break.

BY MR. MCGEE:

Q. You as a UPS driver have no control over the size or weight of packages that customers ship, do you?

[161] A. Correct.

Q. And your job is to deliver whatever packages the shippers decide to deliver to a certain area or certain address, regardless of the weight, as long as it's within UPS's limits, correct?

A. Correct.

Break.

MR. McGEE: You want to take a break?

THE WITNESS: Oh, yes.

(Brief recess.)

BY MR. MCGEE:

Q. Ms. Gustafson was referring to something as the Annapolis route. That is not a fixed route in the sense of, let's say, a milkman delivery who stops at the same houses every day and goes down the same path every day.

A. It's very rarely that you stop at the same house every day in our job.

Q. So what you've been referring to as the Annapolis route means the area of Anne Arundel County and Calvert County, is that right?

* * *

[178] A. I have.

Q. Have you read the whole thing?

A. Not if it doesn't pertain to me. I can go get a copy if you'd like.

Q. You've referred to employees, including yourself, who have combo jobs, correct?

A. Correct.

Q. Those are full-time jobs under the collective bargaining agreement, correct?

A. Correct.

Q. Are they also referred to as Article 22.3 jobs?

A. Correct.

Q. That's because that's a provision of the collective bargaining agreement that creates full-time jobs by combining part-time jobs, correct?

A. Correct.

Q. Employees who have combo jobs or Article 22.3 jobs have full-time seniority, correct?

A. Correct.

Q. And full-time employees under the [179] collective bargaining agreement have greater rights than part-time employees, correct?

A. Correct.

Q. A part-time employee cannot bump a full-time employee, can they?

A. Not that I'm aware of.

Q. Have you ever met Sharon Gustafson before?

A. Yes.

Q. How many times have you met Ms. Gustafson.

A. Once.

Q. Where was that?

A. Here.

Q. In her office? When did you meet with Ms. Gustafson in her office?

A. I'd have to go outside and get my book.

Q. Why did you meet with Ms. Gustafson here in her office?

A. Peggy asked me to.

Q. Was anybody else present?

A. No.

* * *

[182] A. Same areas.

Q. What are they?

A. Anne Arundel and Calvert County.

Q. Who else currently delivers EAM packages to Anne Arundel and Calvert County?

A. I do.

Q. If she was instructed to, or you were instructed to, you also could be required to deliver packages to the District of Columbia, correct?

A. Correct.

Q. It's your job to do whatever management – management has the right to direct you to do that, correct?

A. Correct.

Q. The basic deal is the business is to deliver the packages that the customers end up sending, and to meet the commitments, and that's your job to do that, correct?

A. Correct.

Q. That's Ms. Young's job, correct?

A. Correct.

[183] Q. That's regardless of the weight of the package, as long as they're under 70 pounds, correct?

A. Correct.

Q. Sometimes that involves packages that are over 20 pounds, correct?

A. Correct.

Q. The customer has the right to ship either next day air or second day air packages that weigh over 20 pounds, correct?

A. Yes.

Q. And that happens, doesn't it?

A. Yes.

Q. You testified that Peggy Young had problems coming back to work after she became pregnant. What did you mean by that?

A. She thought she was coming back one date, and they told her no. When she got back they said are you supposed to be back? That type of thing.

Q. Anything about that other than what Peggy Young told you?

A. No.

* * *

[196] Q. For how long?

A. I don't know.

Q. What year?

A. I don't know.

Q. How did she hurt her foot?

A. A package handler at the airport put a box on top of it.

Q. Was it an on-the-job injury?

A. I guess so.

Q. Who authorized that alternative assignment?

A. I don't know.

Q. Was Carol Martin aware of that or involved in that?

A. I don't know.

Q. Was Tina Butler, to your knowledge, ever given any type of light duty or alternative work assignment?

A. I don't know.

Q. Did you ever hear that she was?

A. She was supposedly doing alternate work while pregnant.

[197] Q. Did you ever see her do that?

A. No.

Q. Did you ever talk to her about that?

A. I did.

Q. What did she tell you?

A. That she was pregnant and she was doing light duty.

Q. What was her regular job?

A. Full-time driver.

Q. Full-time package car driver?

A. Yeah.

Q. Out of what center?

A. Well, she was in one center, and then she bumped over to another one.

Q. What centers are you talking about?

A. I know she worked in Metro, but I don't know what other center it was.

Q. When did she become pregnant?

A. I don't know.

Q. What year?

A. I don't know.

Q. How long ago?

[198] A. Years.

Q. More than five years ago?

A. Probably.

Q. What did she tell you? She being Tina Butler?

A. She was going to have a baby.

Q. Did she tell you anything about any light duty or alternative work assignment?

A. She said they weren't going as heavy as what they usually do on her route. That's all she said.

Q. What does that mean?

A. I guess they weren't loading her truck as much, I don't know.

Q. So she continued to work as a UPS package car driver while she was pregnant?

A. The way she spoke I was understanding that to be, yes.

Q. Do you have any other knowledge or information about her situation other than what she told you?

A. No.

* * *

[220] Q. What year?

A. Before full time driving, so before 2000.

Q. What year?

A. I don't know. I mean, I can go back through records if you want me to go back and pull –

Q. You don't remember what year you had that position?

A. No, I don't. I've done everything in the building. Like you say, you get pulled to different areas.

Q. If you're an inside employee, you can be pulled to any area in the building to lift, load, and do whatever is necessary to move the packages, correct?

A. Yes.

Q. Is carwash a bid position?

A. I don't know.

Q. To get a carwash position you have to sign a bid list, correct?

A. They have put me in the carwash position. My bid is air driver clerk. Whenever they need –

* * *

[236] A. I don't know.

Q. You testified about Quatrice Pendleton being given a smaller vehicle while she was pregnant.

A. Yes.

Q. Who made that decision?

A. Don't know.

Q. Do you know why she was given a different vehicle?

A. I would assume because of the pregnancy.

Q. Is that just an assumption on your part?

A. I thought they were trying to help her out.

Q. Is that just an assumption on your part?

A. I guess so.

Q. Do you have any personal knowledge of the reason why she was in a different vehicle?

A. No.

Q. When was she given a different vehicle?

A. I don't know.

Q. Pardon?

A. I don't know.

[237] Q. I think you testified something about other people picking up the slack for her while she was pregnant.

A. In D.C. you work with a couple of different people, and I was just saying that they were helping her out.

Q. What was her job?

A. Delivery.

Q. Package car driver?

A. EAM.

Q. Part time?

A. Yes.

Q. You say you heard that people were helping her out. What do you mean by that?

A. Like when they would divide up the packages, the guys would say, oh, I'll take that one, I'll take that one. You take this one. They would give her the little stuff.

Q. The male employees would take the heavier packages?

A. Yes.

Q. When you say heavier packages, what do [238] you mean?

A. You said heavier.

Q. What kind of packages?

A. I don't know. I was in my section, she's behind me. I don't know.

Q. What kind of packages did they give her as opposed to keeping for themselves?

A. I wasn't there. She was taking a little van, so she wasn't taking anything big. The guys had cars.

Q. So they were taking the bigger packages?

A. Yes.

Q. When you say bigger packages, what do you mean?

A. I mean whatever was bigger or I guess what they might have thought was out of her capacity. I don't know.

Q. So you're just relying on what other people told you.

A. No, at that point – I had heard them at one point say, no, you take this, we'll take this. She stands behind me at a table, and I'm on the

* * *

[252] A. Yes.

Q. What did she say to you in those telephone conversations?

A. Just that she was ready to come back, and it wasn't telephone conversations. It was one right before she got back.

She was having problems coming back because she didn't know who to talk to. Nobody wanted to talk to her about coming back.

Q. Did Peggy Young ever tell you that she had a doctor's note with some type of lifting restriction?

A. Yes.

Q. When did she tell you about that?

A. After she went to the doctors.

Q. What did she tell you?

A. She had a lifting – she couldn't lift over 20 or 25 pounds, or something like that.

Q. Was that after she became pregnant or was that in connection with her efforts to get pregnant through in vitro fertilization?

A. That I don't remember because when she [253] was trying to get pregnant we were trying not to let her do anything strenuous that would affect her chances of getting pregnant.

Q. Well, was there anything strenuous about her job?

A. Yes, it's strenuous.

Q. When you say strenuous, what do you mean? From a physical point strenuous?

A. Both.

Q. What aspects of her job were physically strenuous or demanding?

A. I don't know.

Q. Well, what is it that you were trying to arrange for her not to have to do?

A. Not to lift the heavy stuff.

Q. How did you go about doing that?

A. I would take it.

Q. When you say heavy stuff, what are you talking about?

A. Anything over 25, 30, 40 pounds.

Q. As far as you know, did Peggy Young ever give anybody any type of doctor's note or

* * *

[280] do her regular job if she needed to?

A. If she had permission?

Q. If UPS would let her, she could come to work and do her regular job.

A. Oh, yeah.

Q. Did you also understand that it was her position that if UPS wanted her to do light duty, she would do light duty?

A. Yes.

Q. During the peak season that you've testified to earlier, can employees – part-time employees such as Ms. Young – volunteer for extra hours if they want to?

A. Yes.

Q. Do you know that she on occasion did work extra hours during peak season?

A. Yes.

Q. You testified earlier about bringing in a doctor's note. That it was the only way UPS would let you work you say.

A. They wanted doctor's notes for everything. If you take off, they want a doctor's [281] note. So everyone has to have a doctor's note.

Q. Is that written into a policy anywhere, or is it just something you've heard? How do you know that?

A. I've never seen it per se in writing, but I've always been told you have to have a doctor's note to pertain to being off, being on disability, light duty, being whatever.

Q. How about coming back to work after leave?

A. You can't come in the door without having it in your hand.

Q. Would it surprise you to know that nobody ever asked Peggy Young for that return-to-work note that you saw in her hand when she came back to work?

A. That would surprise me.

Q. But you never heard anybody ask before, did you?

A. No.

Q. You testified Bill Riggins was the manager at the time she came back to work in 2007

* * *

[309] time you were on light duty after that?

A. I was on light duty before she sat on it, too.

Q. Okay.

A. It was already in the course of healing, I guess, and she helped it get worse, and then –

Q. Okay.

MS. GUSTAFSON: No more questions. Do you have any?

MR. McGEE: Yes.

RECROSS-EXAMINATION

BY MR. McGEE:

Q. Were you given any type of light duty work assignment as a result of your daughter sitting on your knee?

A. I was already on light duty.

Q. You were already on light duty because of an on-the-job injury to your knee, correct?

A. Yes.

Q. When did you tell Peggy Young that you would lift her heavy packages for her?

A. I've always lifted her heavy packages.

[310] Q. Please listen to the question.

A. I heard what you said.

Q. I asked you when, not what you always did.

A. I'm answering you. I'm answering you. I made it known to her and told her after she had that miscarriage.

Q. The reason you told Peggy, or wanted her to know that you'd lift her heavy packages for her, was because you were concerned that if she lifted heavy packages that could jeopardize her health or safety or the health and safety of the fetus and cause her to have another miscarriage?

A. Yes.

Q. When did you tell any supervisor or manager that you would lift Peggy Young's heavy packages for her?

A. During and after the fact. When she wanted to come back, I told Bill if you can get her back – when she was pregnant, if you could get her back, I would do all her work. That was with Bill.

* * *

[312] A. Yes.

Q. Do you know if Peggy Young was still interested in coming back to work immediately prior to giving birth to her child?

A. I don't know.

Q. Who made the decision not to give Peggy Young a light duty work assignment?

A. I don't know.

Q. Who made the decision that Peggy Young would have to remain out on leave if she was not able to do her regular job?

A. I'm assuming Carol Martin.

Q. That's based on what? Peggy Young told you?

A. Yes.

Q. Do you have any other basis for knowing who made those decisions or why they were made, other than what Peggy Young told you?

A. No.

Q. What provision of the collective bargaining deals with employees who – drivers who fail a Department of Transportation required

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MARYLAND

PEGGY YOUNG, Plaintiff, v. UNITED PARCEL SERVICE OF AMERICA, INC., UNITED PARCEL SERVICE, INC. Defendants.	Civil Action No. DKC 08 CV 2586 VOLUME I

Videotaped Deposition of PEGGY S. YOUNG

Baltimore, Maryland

Thursday, June 11, 2009

Reported by: Samara J. Zink

Pages 1 through 379

* * *

[14] THE WITNESS:

would tell me to do or not to do.

Q And can you give me some examples of things that you recorded in there?

MR. McGEE:

A If I was told to lock something in in signature mode, who told me and what stop it was.

Q And why did you start that daily log?

A It was advised to me to do so.

Q By whom?

A A co-worker.

Q Who was that?

A Cici Richardson.

Q When did she advise you to do that?

A I can't recall the date that she advised me to do so.

Q Did you start keeping the log soon after she advised you to do that?

A No.

Q Does that daily log address or deal with or mention anything about – anything other than events that are occurring at UPS?

A No.

* * *

[19] A I'm not a big medical – medication taker.

Q Over the last five years have you been hospitalized for anything other than in connection with your in vitro fertilization, your pregnancies, or childbirth?

A Are you including my D & C that I had to have for a miscarriage?

Q When was that?

A September of 2005.

Q I am excluding that.

A No.

Q Have you ever filed a workers' compensation claim at any job?

A UPS, yes.

Q Have you ever filed a workers' compensation claim at any job other than at UPS?

A No.

Q How many workers' compensation claims have you filed at UPS?

A One.

* * *

[23] need him to record. The previous – the 2007 one he was in recording engineering school.

He also goes from pretty much February 1st till the middle of March with the exception of – did he go in 2008? I can't recall. There was two years he did not go.

Q When did you first learn that you were pregnant in 2007?

A It was at the end of August.

Q Was your husband away from home for any extended period of time between August of 2006 and when you gave birth?

A I don't recall if he went to UMA that year or not.

Q Do you have any issues or problems in your current marriage?

A No.

Q How many children do you have?

A Three.

Q Can you give me their names and dates of birth?

* * *

[31] A Teresa. I do not know her last name.

Q And who is Teresa?

A I don't know her official title. I know she used to be in payroll. I believe she's an OMS clerk. I don't know. She works in the office and she's in the University or the Anacostia office now. I was told to go to her to get one.

Q Who told you to do that?

A I can't recall who said that.

Q Why did you request your Pittsburgh at that point in time?

A Because I had learned that my medical benefits – I no longer had medical benefits as of January 1, 2007.

Q Why did you request your Pittsburgh?

A Because I contacted the union and spoke to Tony Pender and he said that I was coded as disability in the computer.

Q What – and why did you request your Pittsburgh?

A Because I shouldn't have been coded as [32] disability; I wasn't disabled. I guess that's how UPS termed me.

Q What do you claim you should have been coded on the Pittsburgh attendance form?

A I don't know all their codes on the Pittsburgh so I could not tell you what I should have been coded. It's not my job.

Q And why is it you claim you should not have been coded as disability?

A Because I wasn't disabled. I could have worked.

Q Have you received any other documents from anybody in this case – excuse me – anybody relating to any of the events in this case?

A I guess Aetna when I filed for short-term disability: my application, my denial, my appeal.

Q Did you ever receive any computer printouts or printouts of any computer screens relating to UPS's GEM system or human resources information system?

* * *

[44] Q Which child's doctor's appointment was that?

A Chase's.

Q Was that the psychiatrist?

A Yes.

Q And was that something that you were asked to attend?

A Yes. He was a minor, I had to.

Q What does MCCS stand for?

A Military Community Service. I don't know what the second C is.

Q What was – what is your job there?

A At Eighth and I, I bartend.

Q What was your work schedule there at the time you became pregnant in 2006?

A I only work there Friday nights May through August, so it did not affect me at all. When I went through in vitro, I didn't go because I could not lift anything over 10 pounds.

Q So during what period of time do you claim that you could not lift over 10 pounds?

[45] A I could not from the end of July till the end of August.

Q 2006?

A Yes.

Q And were you working at UPS from July 2006 through August 2006?

A No.

Q Why not?

A Well, I was working towards the end of July. Because I was out on FMLA for my in vitro.

Q Okay. But you're only entitled to FMLA if you're unable to do your job at UPS. Are you claiming you were unable to do your job at UPS during that period of time?

A I could not lift anything over 10 pounds. And I had to be at daily or every-other-daily appointments at the time that I was supposed to be at UPS.

Q So did your job at UPS require you to lift over 10 pounds?

A They require you to lift 70 pounds.

* * *

[48] Q What gave you that impression?

A I have no knowledge of the FMLA rules, so I don't know.

Q Did you read the forms that you filled out?

A Yes, but it never said that I could take individual days that I recall it saying.

Q Did you want –

A They just said you're entitled to take up to six weeks, so I assumed they were all together, not one day here, two days here, or three days there. I did not know that; it was not made clear to me.

Q Well, did you ask anybody whether you could come to work on the days that you didn't have doctors' appointments?

A No.

Q Why not?

A I just didn't.

Q Why not?

A I just didn't.

* * *

A Yes.

Q Okay. Who was that?

A I'd seen many different doctors during in vitro. I could not specifically name every single doctor that I'd seen.

Q Okay. What did your doctors tell you about working at UPS during July and August of 2006 while you were undergoing in vitro?

A That I had a weight restriction of 10 pounds, I could not lift anything more than 10 pounds because of the procedures that I was going through.

Q Okay. I understand that. I want to know, what did you talk about, what did you discuss about working at UPS?

A I explained to my doctor that I had to be to work at 6:30 in the morning and that we're required to lift 70 pounds, that I hardly ever had to, and that I had – he said that you have a weight restriction of 10 pounds so you cannot lift more than that, because I could break off an egg [52] of the follicle, it would be very harmful to me.

Q Well, did you tell your doctor that your job didn't involve lifting more than 10 pounds?

A No, I didn't think about asking him about my job then.

Q Well, did you want to come to work during those days that –

A At that time, no, I didn't. I'm trying to conceive a child. I had just had a miscarriage. No, I did not want to.

Q Well, what – what does your job at UPS have to do with that?

A UPS. policy is every driver/preloader must lift 70 pounds.

Q I already know what the policy is, but I'm asking about you. Why didn't you want to come to work at UPS during this period of time that you were trying to get pregnant but didn't have a doctor's appointment?

A Not that I didn't want to come to work.

Q Well, you just told me you didn't want [53] to come to work –

A Well, then I didn't –

Q – because you were worried about a miscarriage.

A Yes, at that time I did not want to come to work because I did not want to take the chance of not being able to become pregnant because lifted something heavier than I should have recommended by my doctor.

Q So you realized that you – if you did your job at UPS you might be asked or required to lift something more than 10 pounds, correct?

A During my in vitro session?

Q Yes.

A Yes.

Q And what types of things more than 10 pounds did you fear that you might be asked to lift?

A In the area that I delivered, normally, my normal delivery area –

Q Well, I –

* * *

[56] harm your eggs. At that particular time in the in vitro, you can harm your eggs, yes.

Q Have you ever worked at MCCS on Eighth and I at any time other than between May and August?

A No.

Q And why is it that you work there between May and August?

A Because that's when the sunset Friday night parades occur. That's the only time they are, is during the summer on Friday nights. That's just the schedule.

Q Have you had any other employment other than what you've described to me since January of 2002?

A I was a bar manager at Medieval Times for a month and a half.

Q What year?

A 2003. It may have been two months. They were in the middle of building.

Q Any other employment since 2002?

* * *

[65] Q – Prince George's Community College that you never even attended, correct?

A Correct.

Q Did you think that was right?

A No, but I never even went to the UPS office here in Maryland till I actually moved here.

Q Were you hired by UPS in Maryland?

A Yes.

Q What was your date of hire?

A They had my date of hire as January 20th, 2002 because they had to take me out of the system in Dallas, that's why it took so long.

Q What was your first job at UPS in Maryland?

A PM air driver.

Q Have you always worked at what is referred to as the D.C. building in Maryland?

A Yes.

Q Okay. And that's the one located in Landover?

[66] A There's actually two in Landover, but I work at the 8440 Ardwick-Ardmore Road building, yes.

Q For how long did you work as a PM air driver in the D.C. building?

A I want to say January of 2002 till September of 2002.

Q What happened in September 2002?

A My children were coming to live with us, my current husband and I, they were going to start school, so I preferred to be at home in the evenings with them. They said I could transfer to the morning because they had a spot opened, so I transferred to the morning shift.

Q As what?

A As an EAM delivery driver.

Q Have you had any other jobs at UPS since 2002?

A No.

Q So you've worked as an EAM delivery driver out of the D.C. building since approxi-[67]mately September 2002 up through the present?

A Yes.

Q And what does your job as an EAM delivery driver involve?

A I deliver early morning deliveries due – the area that I do is 8:30, due by 8:30.

Q Pardon?

A So basically I drive, I drive and deliver packages.

Q What type of packages?

A Mostly letters and packs.

Q And what else other than letters and packs?

A Sometimes, very rarely, boxes.

Q And what is your delivery area?

A Annapolis. Annapolis, Calvert County.

Q When you say Annapolis, you mean Anne Arundel County?

A We don't do all of Anne Arundel County. We only do Davidsonville and Annapolis, and they're in Anne Arundel County but they call it [68] Annapolis.

Q And Calvert County?

A Yes.

Q Have you delivered to those areas – has that been your general area the entire time that you've worked as an EAM delivery driver?

A No.

Q During what periods of time did you deliver to that area, Anne Arundel and Calvert County?

A I want to say beginning summer of 2005 where it was a constant.

Q Since the summer of 2005 have you delivered to any other areas other than Davidsonville, Annapolis, and Calvert County?

A Sometimes to D.C.

Q What do you mean by that?

A On Saturdays I would do – because I had the knowledge of the Embassy route, I would do deliveries there sometimes on Saturdays because they didn't have anybody to cover that area. Then [69] they finally got somebody to cover that area and just every now and then they'd have me go to D.C. until late summer/fall of 2007 when I was, I felt in retaliation, told to go to D.C. quite often, try and do a meet point all the time.

Q Explain what you mean by a meet point.

A You meet – a part-time air driver meets a full-time driver with a package truck. If he can't get all his airs off by 10:30, the commit time, he would divide the airs up between you and him so you could make the commit time on them.

Q And that's part of your job as an EAM delivery driver?

A Yeah. Well, from 2005 until July of 2006 I helped do airs in Annapolis. I would meet a driver, a full-time driver, in Annapolis and just do airs. We're not required, unless extreme circumstances, to do any other types of deliveries, but we have to work as instructed, so

Q Okay. When you say airs, you're talking [70] about either –

A Next-day airs, two-day airs.

Q Okay. So what UPS refers to as its premium service packages, correct?

A I know EAM is considered premium. I don't know what they consider the next-day or the two-day air because they have next-day air savers that are not due until 5 p.m., they have two-day airs that aren't due until 5 p.m., so I don't know if they consider that premium or not. I know the EAMs are considered premium.

Q And those are packages that customers pay extra for and in exchange for their extra payment UPS commits to deliver them by a certain time, correct?

A Correct.

Q Now, what is it that you were doing in 2005 and 2006? You explained to me that you were doing something.

A Oh, from 2005 to 2006 I was delivering to Annapolis and then I would meet a full-time [71] driver in the Annapolis area and deliver – you know, help deliver next-day airs in Annapolis.

Q When you say Annapolis, you mean the –

A No, Annapolis.

Q – the city of Annapolis?

A The city of Annapolis.

Q And how long did you continue to do that?

A The Annapolis area? Till – till I returned. I think I did it from having Triniti in 2007.

Q Okay. So immediately before going out on leave in 2006 in connection with your in vitro fertilization, that's what you were doing: You were delivering early morning packages to the Annapolis area, then you were meeting a regular full-time package driver someplace at a meeting point, getting packages off of his truck put into your vehicle, and then you would then help him deliver those; is that correct?

A Airs, yes.

[72] Q And airs were either next-day air or second-day air packages, correct?

A Yes.

Q And who was the package car driver that you were – you would meet?

A Chris Trader.

Q I'm sorry, the last name?

A Chris Trader, T-r-a-d-e-r. I believe that's how you spell it.

Can we take a bathroom break?

Q We can take a break now. And just to remind you, we can take a break at any time you want to take a break, so just don't be afraid to speak up. And –

A Yes, I need to go to the restroom.

Q – absolutely now we can take a break.

THE VIDEOGRAPHER: The time is 10:53:16. Off the record.

(Thereupon, a short recess was taken.)

THE VIDEOGRAPHER: On the record. The time is 11:04:21.

[73] BY MR. McGEE:

Q Ms. Young, we were talking about your job at UPS in 2006 prior to you going out on leave, correct?

A Yes.

Q Okay. And you at that point would deliver EAM packages or early morning packages to the Annapolis area, then you would meet package car – regular full-time package car driver Chris Trader at some meeting point, he would download his air packages or some of his air packages to you, and then you would then deliver those packages for him, correct?

A Yes, just the airs, though.

Q And do this for me, for that period of time, and I'm talking about 2006 prior to you going out on leave, kind of run me through your day from the beginning of the day to the end of the day or shift. You know, tell me – you know, give me different breakdowns in times, where you were and what you did.

[74] And to make it easy, how did you begin your day; where did you begin your day?

A I believe that my start time at that point in time was 6:30.

Q A.m.?

A A.m. You would come in, you'd pick up your DIAD board, you'd clock in.

Q This is all at the D.C. building?

A All at the D.C. building, yes. We would have to go into the Metro center to grab our DIAD board. We would walk to the air center. We have an air center office. I believe that they were still assigning keys. Keys are a big issue at work about vehicles. You would go pick up your keys. And then I would go to my van and do what we call a pretrip on your vehicle, sign your DVIR.

Q And what did the pretrip involve?

A Checking to make sure there's no fluids leaking under it, make sure your tires are all inflated, no dents, check your blinkers, check your headlights, check your taillights just to [75] make sure your car is safe to drive and everybody can see all your intentions.

Then we would all meet in an area where whoever brought – the shuttle driver brought the packages that we needed to deliver back to the building.

Q Okay. And the shuttle driver is somebody who had gone to the airport, gotten packages off the airplane at the airport, brought them back to the D.C. building to then be distributed among the various EAM drivers?

A Yes. Then – at that point in time Cici, I believe, was still going to the airport, she had been going to the airport, so she would just – whatever Annapolis came back from the airport I would take at that point.

Q Okay. So –

A So she did all – she or whoever at the airport did all of the dividing of the packages. I had no say-so at that point in time of the dividing of the packages, she did it all.

[76] Q And do you know how she decided to divide the packages between you and her and/or others?

A Mostly by area. But Cici is like my mother. However, she's not that much older than me. She never wanted me to take heavy stuff. She always did it on herself. She's the type person she just didn't want me to take it. I don't know why she did it. She always had done it.

Q Did she ever tell you why she didn't want you to deliver heavy stuff?

A No. To this day we argue about heavy stuff. To this day she doesn't like for me to take heavy stuff; she won't give me heavy stuff.

Q Well, has she ever told you why she doesn't want you delivering the heavy stuff?

MS. GUSTAFSON: Objection, asked and answered.

THE WITNESS: No, she really hadn't told me why. Through our whole career of working together she's never said why up until the point [77] when I was trying to get pregnant.

BY MR. McGEE:

Q Okay. And what did she say about it at the point you were trying to get pregnant?

A That, you know, I had had a miscarriage and she didn't want me to lose a baby – another baby and that she's bigger than me and she didn't want – you know, she wouldn't ask somebody else to do something she wouldn't do.

Q Well, she would do that, right, she would deliver the packages?

A Yes.

Q Okay. But she told you, consistent with what she testified to yesterday, that she didn't want you to deliver heavier packages because she was concerned that that might cause another miscarriage, correct?

A Yes, she was concerned of that. Yes.

Q And she told you that?

A Yes.

Q And what did you say in response to [78] that?

A I told her it's no big deal, Cici. You know, I feel bad for her taking all the stuff, all the heavy stuff. I said it was no problem for me.

Q How did the packages get from the shuttle driver's vehicle into your vehicle?

A Now the shuttle driver –

Q I want to talk about the period of time in 2006 prior to you going – immediately prior to you going out on leave.

A People just jumped up and unloaded it. It was various people. Anybody that volunteered to go up and help unload is who did it.

Q Well, did you do that?

A Prior to 2006, more than likely, yes, I have.

Q I meant during the period of time in 2006 immediately prior to you going out on leave.

A Yes, probably.

Q So you would go into the vehicle that the shuttle driver had –

[79] A Well, usually it was a van, so the van – they changed it to a bigger truck later. At that point in time, I believe it was a van, sc it was not a matter of going in. And everybody would just get around the vehicle and start just tossing things out so that it could be sorted. So it was like a voluntary thing.

Sometimes the stuff was already sorted. If the shuttle driver got back early, sometimes when you came in to work it was already there.

Q But other times you would – you and the other EAM drivers would meet the shuttle vehicle and then get into it and unload the packages that had come from the airport and then sort them, correct?

A Yes. However, a lot of the more senior people didn't do it. They felt as though they'd done their time.

Q You were not one of the more senior people?

A Yes, I was at that point in time. I am. [80] I still am.

Q Okay. But that was part of your job, correct?

A Correct.

Q All right. So then you say it was – Cici Richardson would then decide which of the packages from – that were destined for the Anne Arundel County or Calvert County area she would deliver and which you would deliver?

A She would do her area and I would do whatever she gave me to do.

Q Okay.

A I'm assuming either her or whoever was at the airport, because she went straight from the airport to Annapolis where my stuff comes back to me.

Q Okay. So she had already done that kind of sorting at the airport?

A If she did it, yes, maybe. I don't know if she had somebody else sort it for her. I was not at the airport, I cannot say.

[81] Q Okay. And again, how did those – so we talked about how the packages were unloaded from the shuttle vehicle. Then how did they then get uploaded onto your vehicle?

A At that point in time, the majority of our things were letters and packs. I'd just pick them up and carry them.

Q Okay. But whatever it was, you were the person who loaded them onto your vehicle, correct?

A Correct. Prior to that if ever I had over 70 or something that was odd-shaped, you're always to get help.

Q Anything over 70 pounds the instructions are you should get help for, correct?

A Yes.

Q And that's what you did when you had packages over 70 pounds?

A Very rare, yes. And not even me lift them. We'd get a handcart, slide them onto the handcart and roll them.

Q But if it was under 70 pounds, you were [82] expected to handle that on your own?

A Not if it was an odd-shaped. I mean, I've had boxes that weigh 30 pounds that are this big (indicating), you know, like two or three feet long, two or three feet wide, that just – it's difficult for me because I have short arms.

Q Sure. But if the dimensions of the package were relatively small, you were expected to be able to put that on your vehicle –

A Yes.

Q – if it was under 70 pounds?

A Yes.

Q And once your vehicle was loaded at the D.C. building you would then go and deliver the packages, correct?

A Yes, I would go to Annapolis, look at my stops, map out in my mind which stops I was going to go to first, attempt or deliver whatever. Sometimes things aren't open. You have to leave an info notice, you have to go back, you have to sit and wait till maybe somebody – you can see [83] somebody come in the office or till when you're open.

Once we had all those delivered, we .would go – we ended up meeting Trader at Renard Court a lot of times. He has a route that has – goes down a couple of neighborhoods that are really small roads so he generally would give us those.

Q Who's us?

A Cici or I. We both – if he was heavy, we both would meet him. We'd deliver the next –

Q Okay. Let's just take – so you would meet Chris Trader, the full-time package car driver –

A Yes.

Q – someplace out in the area?

A Yes.

Q Packages from his package car would then be taken off his package car and put into your vehicle, correct?

A Yes.

[84] Q And who did that?

A He divided them up. He would never give me or Cici boxes. He's that type of driver that he would not want us delivering the boxes. He would give us the letters.

Q Did you ever meet any package car drivers other than Chris Trader out on the road to take their airs?

A If I wanted the extra hours and there was another Annapolis driver that needed the help yes. I believe we met in Eastport sometimes. I could not remember that driver's name.

Q So you would then – you would accept packages from Chris Trader, put them into your vehicle, and then deliver those vehicles (sic)?

A Yes. Those packages, yes.

Q Excuse me. Yes. I apologize.

And typically what time would you meet Chris Trader at the meeting point?

A The time has changed so much since then.

Q And again, I'm talking about in 2006 [85] prior to you going out.

A I want to say he was down there by – if he wasn't down there by about 9 or 9:10, we were on the phone to him, where you at.

Q And then once you got packages from – the air packages from Chris Trader you would then go and deliver them?

A Yes.

Q And in either case, whether it's the EAMs or the other air packages that you got from him, you delivered the packages wherever they were addressed to, correct?

A Correct.

Q And that varied from day to day, correct?

A Correct.

Q And you delivered whatever packages were – customers were sending, correct?

A Correct.

Q You didn't have any control over that, did you?

[86] A No.

Q And customers could send for early delivery or other air packages of any weights that they wanted to, correct, as long as it was under 70 pounds?

A Yes. You can send something over 70 pounds.

Q And whatever the customer sends UPS is responsible for delivering and meeting that time commitment, correct?

A Correct.

Q And typically what time did you complete your deliveries of the airs from Chris Trader?

A When I completed them, I was usually done by about I'd say quarter to ten, 9:45.

Q And would you then go back to the D.C. building?

A Yes.

Q And what did you do once you got to the D.C. building?

A You pull into the – well, we don't have [87] an assigned bay, we just have an assigned area where all

of our vans are parked. You back all the way up, you fill out your DVIR, turn it in. At that point in time, I think – were we turning our keys in? I'm not sure if we were still turning our keys in or not. And punch out and leave. And I would go to my next job.

Q What was your next job?

A In 2006 I delivered flowers.

Q And what time were you supposed to be there?

A There wasn't a supposed-to time. We had to meet at 1:00, I believe, where we all traded flowers to the areas that we delivered to.

Q And what was your delivery area –

A Annapolis.

Q – for Floral Express?

A Annapolis.

Q Just do me a favor, just try to wait until I finish the question before you give the answer.

* * *

[[96] because my first in vitro I got lost in the cracks.

Q What do you mean by that?

A I had never heard of Ms. Martin until my second IVF. Her and another lady, when I come (sic) back in October of 2005 after my D & C, I don't recall the other lady's number – name, came into the air

office and spoke with me about the procedures that should have been done with me when I was doing my first in vitro.

Q Well, you say you got lost in the cracks during your first in vitro.

A That was their words to me.

Q Okay. And what happened?

A I lost my medical benefits because I went to Ahmed, explained to Ahmed my situation. handed him my letter that I was going to in vitro, had to go to every-other-daily – if not daily, every-other-daily appointments, and I gave him the letter. He said, okay, that's all you need, you're fine. And I kind of thought, well, okay, [97] I've never been through this procedure before, the IVF, I've never had to go out for any sort of reason at any of my other jobs ever in my history so I wasn't sure what I was supposed to do. I was relying on my supervisors to guide me in the correct way.

Q Well, did you ask your supervisors any questions?

A Well, of course I did.

Q What questions did you ask?

A The things that I needed to do. I explained what I was going to do –

Q This is to Ahmed?

A Yes, this is to Ahmed – what I needed to do about my appointments, what was going to happen, and he said just bring me a doctor's note. I brought in the doctor's note. I made several phone calls to him. He said yeah, yeah, everything's taken care of and that was the end of it.

Q And in October of 2005 when you met with [98] Carol Martin and the other female, what did Carol Martin tell you at that time?

A I'm not going to verbatim speak as far as what specifically got said. It got told that I should have filled out FMLA paperwork, and I can't recall the rest of the conversation.

Q Did Carol Martin tell you who she was?

A Yes, she did.

Q When you came back to work in 2007 after the birth of your child, who was your supervisor?

A Bill Riggins.

Q Had Bill Riggins ever previously been your supervisor?

A No. That was the first time for me to ever meet the man.

Q Who was the supervisor of the EAM drivers in 2006 and 2007 while you were out on leave?

A My assumption was Ursula Blunt. I do know at the point in time when I was on my way – during my in vitro, I believe she was on her way

* * *

[100] center.

Q When you returned to work in 2007, what was your job?

A When I returned to work in 2007, basically I had the same job as when I left. Probably maybe a month went by that I returned and then I started doing – going to the airport with Cici.

Q And was that the first time that you had gone to the airport?

A I may have gone – I don't know if I've gone before that or not. I want to say I have because I happened to know where they all met, but I'm not certain. It wasn't like a daily thing. Probably maybe one time, but I don't know when it was and I don't know the circumstances.

Q Okay. But shortly after you returned to work in 2007 you would start the morning by leaving the D.C. building, going to the airport with Cici Richardson, unloading packages from the plane onto your vehicle, and then delivering the [101] packages?

A Not from plane. The canisters would come inside the –

Q Off the belt, correct?

A Yeah, they would –

Q So there would be a conveyer belt, somebody would be inside the plane putting –

A Yes.

Q – packages on the belt, you would then take the packages off the belt at the airport?

A I would not take the belt off – the packages off the belt. They had people that worked at the airport. They took it off the belt and threw them on rollers and then some guys would take the small bags and go dump them in totes where they were sorted.

Q What did you do at the airport?

A Some days I got the smalls out of the totes. Some days when a can came in I would help unload the can.

Q Unload the can means what?

[102] A Get inside the can and put the boxes on the rollers.

Q Can is what, a container?

A Yes.

Q You would unload the can or container, put boxes on the rollers?

A Yes.

Q Did you also sometimes take the boxes off the rollers?

A Yes.

Q And some of those packages that came off the airport – off the airplane would then be loaded into your vehicle?

A When they were taken off the – out of the canisters or we have docks or bays that – we set them down and there was two guys down below that would sort them out, too.

Q Okay. Some of those packages found their way onto your vehicle, correct?

A Yes.

Q Okay. How did they get onto your [103] vehicle?

A Sometimes when we were done sorting up top I would take them; sometimes they'd put them in our vehicles for us.

Q And then once the packages from the airplane were loaded into your van you would then deliver those packages, correct?

A Correct.

Q And at that point did you also continue to meet a package car driver out on the road?

A When I come (sic) back in 2007, at first, no. Maybe a month, month and a half went by I then was expected to go from Annapolis to D.C. to do a D.C. meet point.

Q And did you do that?

A Well, of course. You have to work as instructed.

Q Did you have any issue or problems with that?

A A lot of days, yes.

Q And that was the time constraints?

* * *

[105] the entire period of time since Bill Riggins?

A Yes.

Q You're a member of the Teamsters union, aren't you?

A As far as I know, yes.

Q You're a part of the bargaining unit represented by the Teamsters union, correct?

A Correct.

Q And the majority of nonsupervisory employees at UPS are part of the union bargaining unit, aren't they?

A I believe everybody in the building is. If you're not management, you are.

Q And the terms and conditions of your employment are governed by the collective bargaining agreement entered into between UPS and the Teamsters, correct?

A As far as I know, yes.

Q You have filed grievances under the collective bargaining agreement, haven't you?

A Yes.

* * *

[114] Q Okay. So in other words you're fearful that UPS would retaliate against you for lying?

A No, not for lying, for calling in sick.

Q Well, for calling in sick when you weren't sick?

A My daughter was sick, but I wasn't sick.

Q Well, I thought you said you were traveling back from Iowa?

A We were. Yes, we were.

Q So your daughter was sick while you were traveling back from Iowa?

A Yes. I took her to the doctor when we got back.

Q Is that why you didn't go to work that day?

A No, I didn't go to work that day because I called in sick.

Q You didn't go to work that day because you were –

A On my way back from Iowa.

Q Okay. You've always been a part-time [115] employee at UPS, correct?

A Correct.

Q On average, as a part-time employee, how many hours a week did you work?

A Part-time employees can work anywhere from 20 to as many hours as they want.

Q How many hours did you typically work?

A For a period of time, I was working almost 30 hours a week.

Q During what period of time was that?

A When I was going to the airport. And during peak seasons, if I want to work extra hours, I can. It's just different times. If there's a center that's down a PM driver, like I know the Embassy center was down a PM driver for some time, I would cover that route for them.

Q Have you ever had a bid route at UPS?

A No. Unless they consider the PM route bid routes, then yes.

Q But as an EAM driver you've never had a bid route, correct?

[116] A No. You pretty much get sent to the area that you have knowledge of.

Q But that's at the discretion of the management, correct?

A At the supervisor, as far as I know.

Q Okay.

A I don't know about the management.

Q Okay. Supervisors are management, aren't they, part of management?

A Yes.

Q Okay.

A When you say management, I think of managers.

Q But since you have never had a bid route, then UPS has the right to assign you to make deliveries in any area that UPS seems – deems appropriate, correct?

A Yes, but they don't send you to areas you are not familiar with because of the time constraints of getting your packages off.

Q But that's up to UPS to decide, correct?

[117] A Yes.

Q Have you ever applied for a full-time job?

A Once. It was a combo job. I believe once.

Q When was that?

A I don't know if it was in 2005 or 2006. I believe it was one of those two years.

Q And to apply for a job – a bargaining unit job you have to sign a bid list, correct?

A Correct.

Q And those types of jobs are awarded based on seniority in accordance with the collective bargaining agreement, correct?

A Correct.

Q And you say you signed a bid list for a combo job in 2005 or 2006?

A Correct, I believe that was the years. It was just one bid list.

Q And you didn't get that job because somebody else had more seniority?

[118] A Yes.

Q Have you ever applied for any other – bid on or applied for any other position at UPS?

A No.

Q And what I would like for you to do is I'd like you to take me through the chronology from the time that you went through your first in vitro fertilization cycle through the time that you returned to work after the birth of your child in 2007. So let's start with, when did your first round of in vitro fertilization start?

A June or July, I want to say July, of 2005.

Q And who were you seeing for medical care or attention –

A Walter Reed.

Q – in connection with that first round?

A Walter Reed. I could not tell you the doctors. You see a different doctor every time.

Q Walter Reed is a military hospital, correct?

* * *

[121] That's the February 2006. I apologize.

Q Okay.

A The 2005 was in July. I got pregnant and I had a miscarriage. I was out until October 1st.

Q Of 2005?

A Yes. So I was out from June/July 2005 till October of 2006. I think I went back to work the 1st of October 2006.

Q Okay.

A No, 2005. I'm sorry. I'm sorry.

Q Let me see if I have this straight. Around July of 2005 you underwent your first round of in vitro fertilization –

A Yes.

Q – at Walter Reed Hospital?

A Yes.

Q You asked to take time off work at UPS because of that in vitro fertilization –

A Yes.

Q – process?

[122] Your request was granted, correct?

A Yes.

Q In connection with that first round of in vitro fertilization did you become pregnant?

A Yes, I did.

Q Okay. And you then had a miscarriage?

A Yes.

Q And I'm sorry to ask you this. I just want to get it in my mind. And that resulted into a D & C?

A Yes.

Q Which was what date?

A It was in September of 2005, because I returned to work October – I believe it was the 1st of October.

Q And when you returned to work, what job did you return to?

A My same normal job, delivering EAMs, yeah, to Annapolis.

Q When did you become pregnant?

A To tell you the truth, when they put my [123] embryos back in me I'm pregnant, it's whether my ovaries accept them or not, so I can't tell you like this day.

Q All right. Take me forward from that. When was the next time after returning to work in October of 2005 that you missed time from work?

A That I missed time?

Q Yeah.

A Oh, my second in vitro was in February of 2006.

Q Okay. Did you miss any time?

A Yes, I was – February of 2006 for my second in vitro I was out three weeks on FMLA.

Q Okay. Did you miss any time between October of 2005 and February of 2006?

A If I had a sick day, yeah, but I couldn't –

Q Other than –

A Other than that, no.

Q Your second round of in vitro fertilization in February of 2006 was with whom?

[124] A Walter Reed Medical Center.

Q And did you request time off again?

A Yes. Well, I was instructed the way to handle it this time was to fill out FMLA paperwork.

Q And that's the conversation that you had with Carol Martin after you returned to work in 2005?

A Yes. And I don't – there was another lady with her, but I don't recall her name.

Q Okay. So when you went out again in 2006 for in vitro, the second round of in vitro fertilization, you asked for leave of absence under the Family Medical Leave Act?

A Yes.

Q And that was at your request?

A Well, my doctor, yes.

Q You asked to take a leave of absence, correct?

A Yes.

Q And UPS granted your leave?

[125] A Yes.

Q Okay. And for how long were you out?

A Three weeks, I believe. I did not end up getting pregnant.

Q So you returned to work in mid March 2006?

A I believe so, yes.

Q Who was your supervisor when you returned to work?

A March of 2006, Ursula Blunt. I believe so, yes.

Q Was Ursula Blunt there in the facility during the hours that you were working?

A Yes.

Q And when you applied for family medical leave in February of 2006 you received a letter from Carol Martin letting you know that your leave of absence request had been approved, correct?

A Yes.

Q And when you returned to work in March of 2006, what job did you return to?

[126] A My same job.

Q Doing the same thing?

A Yes, going to Annapolis.

Q And then after returning to work in March of 2006 did you request subsequently another leave of absence?

A Yes, that was my third in vitro cycle.

Q And when was that?

A July of 2006.

Q And you requested a leave of absence in connection with that as well?

A Yes.

Q And did UPS grant your request for leave?

A Yes.

Q And did you receive a letter from Carol Martin letting you know that your request for a leave of absence under the Family Medical Leave Act had been granted?

A Yes.

Q And the third round of in vitro [127] fertilization, was that also through Army –

A Walter Reed.

Q – Walter Reed Hospital?

A Yes, sir.

Q And while you were on that leave of absence that began in July of 2006 did you have any contact or communication with anybody at UPS?

A I went out, I believe it was the end of July, so not much in July, but then it started. August, September, October I wanted to make sure that all of my paperwork was fine so that I could make sure I had my benefits.

Q When did you find out you were pregnant, about August 22nd, 2006?

A August 22nd, August 23rd, I believe. That's just a blood test that they do.

Q When did you first contact anybody at UPS about returning to work at UPS?

A Wanting to come back to work?

Q Yes.

A After my October 11th doctor's note.

[128] Q Okay. Prior to October 11th did you contact anybody at UPS about returning to work at UPS?

A Prior to October 11th, coming back to work, no.

Q Prior to October 11th, 2006 did you have any contact or communication with anybody at UPS?

A Yes.

Q Who did you contact?

A I brought in a doctor's note. I believe I gave it to Ursula. I believe I tried to get ahold of Carol Martin.

Q Well, let's take one at a time.

A Okay.

Q You said you believe you brought in a doctor's note.

A I believe I brought it in and gave it to Ursala. I think I brought it in – I'm not sure if I gave it to Ursula or not, but I'm pretty sure I did.

Q Did you – do you recall specifically [129] coming to the UPS building –

A Yes.

Q – the D.C. building?

A Yes.

Q When?

A The specific day I don't know, but it was sometime after my August 23rd doctor's note.

Q What month?

A August.

Q So sometime in August after August 23?

A August 23 I found out I was pregnant. That was just a blood test. No, September 13th believe is when I got my doctor's note. So no, I'm mistaken. It's September 13th that I got a doctor's note.

Q So September 13th you got a doctor's note –

A Yes.

Q – from whom?

A From my doctor at Walter Reed.

Q And what did the doctor's note say?

[130] A I believe it said that I was pregnant, that I have a – they recommend me lift 20 pounds through the first – I don't remember how long in my pregnancy and then 10 pounds at the end of my pregnancy. I don't remember the time period of how long – when they said I could.

Q And did you ask for a doctor's note?

A Yes, because UPS requested a doctor's note from me.

Q Who at UPS requested a doctor's note?

A I believe Carol Martin said I had to bring in doctors' notes.

Q When?

A Every time I spoke with her, so that they could keep – I guess keep abreast of what was going on with me.

Q Okay. Well, my question is, what caused you to ask for the September 13, 2006 doctor's note?

A Because I was concerned about my benefits because I believe my FMLA were estimated [131] dates until the end of August.

Q All right. So when you requested FMLA leave in July of 2006, that was approved only through the end of August 2006, correct?

A They were estimated dates, yes.

Q So at the point that you requested a doctor's note on September 13, 2006 your FMLA-approved leave had already expired?

A Correct. That's why I was concerned about getting a doctor's note to see what they needed from me.

Q Did you contact anybody from UPS to see what they needed from you?

A Yes, I contacted Carol Martin, I made several phone calls to our air center, and I believe I made a phone call to Ursala, but nobody ever returned my calls.

Q Did you have any conversations with Carol Martin at any time after you went – you commenced your leave of absence in July and when you went to see the doctor or got the doctor's [132] note on September 13, 2006? During that period of time did you have any conversations with Carol Martin?

A I believe I talked. to her to find out – I was concerned about my FMLA expiring and about my benefits.

Q Did you actually speak with Carol Martin prior to September 13, 2006?

A About this incident? I can't recall.

Q Did you talk to Carol Martin about anything between July 15, 2006 –

A Of course.

Q – and September –

A Of course, my FMLA leave.

Q – 13 –

A Yes, I did talk to her about my FMLA leave.

Q After you were already out on leave?

A Yes, because I had faxed her a note from my doctor, not just the FMLA leave, but the doctor's note also.

[133] Q After you went out on leave on September (sic) 15, 2006 you had a telephone conversation with Carol Martin?

A After Septem – yes.

Q After July 15, 2006 and before September 13, 2006, that's the question.

A Between July and August, no, because – or September, because I was on FMLA leave. They were estimated dates.

Q Okay. So you didn't have any contact or communication with anybody between July 15, 2006 when you started your leave and September 13, 2006 when you got the doctor's note; is that correct?

A Not with Carol Martin, no, I didn't have any discussions that I know of over the phone. I know I was trying to call and left messages.

Q For Carol Martin?

A Yes, for Carol Martin, the air center.

Q Why did you leave messages for Carol Martin?

A I was concerned because I knew my FMLA [134] leave was expired. I was worried about my job, worried about my benefits.

Q Did you know that your benefits were going to end if you weren't on FMLA leave?

A As I read it on there, yes.

Q Read it on where?

A The form that she sent me – not the form, but the letter she sent back to me.

Q What letter are you referring to?

A It's got her – got the UPS symbol at the top. It's addressed to me just letting me know that my FMLA was approved, the estimated dates; that I needed to contact my manager – or is it Gina Norris that's on the paper that I need to contact? – if my leave was – I wasn't going to be back on or about that estimated date.

Q Did you actually speak with anybody at UPS between July 15, 2006 and September 13, 2006?

A Yes.

Q Who?

A I believe I spoke to Teresa in the

* * *

[136] the phone in the air center on some other day?

A Correct.

Q And you claim .that you told both of those people to ask Ursala Blunt to call you?

A Yes. They were all more I would say in the latter of August/first part of September because my leave was – my FMLA leave was approved.

Q Pardon?

A It was more latter of the part, like in August, September part, not really in July, because my FMLA leave had been approved.

Q All right. Then you got the doctor's note on September 13, 2006?

A Yes.

Q And how did you get that doctor's note:

A From my doctor.

Q Face to face?

A Yes, I was at a doctor's appointment.

Q And what did you do with that doctor's note once you got it from your doctor?

[137] A Which doctor's note?

Q The September 13, 2006 doctor's note.

A That's the note I believe I handed if not to Ursala, it was Teresa. I came into the building.

Q When did you come into the building?

A I don't recall the date that I was in the building.

Q What month was it?

A September 2006.

Q Sometime after September 13th?

A 13th, yes.

Q You were still on your leave of absence, correct?

A Well, I knew that it was expiring so I was getting concerned about it.

Q Okay. You were not ready to or asking to come back to work at that point –

A No –

Q – correct?

A – I was not from prior –

[138] Q What time did you come into the building on that day in September 2006?

A It was in the morning. I want to say maybe 8 or 9-ish.

Q Did you go through the guard shack?

A Yes, I did.

Q Were you wearing a uniform?

A No.

Q Did you sign in?

A No, I used my UPS badge.

Q And tell me exactly what you did and where you went after you went through the guard shack.

A When I went through the guard shack, we have a pathway to our building. I walked through the pathway. I turned right because our air center's on the right side. Ours is pretty much the only center there. I went in the office. Like I said, I don't know if it was Teresa or Ursala that was there. I handed them my doctor's note.

[139] Q And what did you say?

A That I was just concerned about my benefits; I need to know what I can do because I'd been making phone calls and I wasn't getting any returns back on them; and I really wasn't ready to come back to work yet because I – my first in vitro I had a miscarriage at eight and a half weeks, so I really wasn't ready to come back to work; I didn't want to push myself yet or try and do anything to harm my new fetus.

Q And what were you told?

A That Ursala would get back with me.

Q That's what Teresa told you?

A I believe so, Teresa, or that Ursala would get back with me about my note and that I needed to –

if it was Ursala – I want to say it was Ursala because she said I had to talk to Carol Martin. I'm pretty sure it was Ursala because she said I had to talk to Carol Martin.

Q And where do you claim this conversation occurred?

* * *

[143] Q And you say your kids' phone. Is there more than one phone?

A My children, yeah. I have two children that have phones.

Q They have their own phones?

A Yes.

Q What are their numbers?

A I don't know. They're on speed dial on my phone. I know one is – their numbers are so close. One's (301), it's either 9995 or 7775 and the other one's is (240) 705-9995 or 7775.

Q And who's the provider for their cell phones?

A Sprint.

Q When you – you say you tried to call Carol Martin at some point after September 13, 2006. Did you – did anybody answer the phone?

A No, she has a voice mail.

Q Did you leave a voice mail message?

A Of course.

Q What was your message?

[144] A That I just had an ultrasound, I have a doctor's note, there's a 20-pound limitation till a certain date and then the 10 pounds, but they wanted me to go in for another ultrasound on October 11th.

Q And you said all this in the message that you left?

A I just said I had a doctor's note with restrictions and that I have to go back again on October 11th. I don't recall if I told her I was ready – I didn't want to come back to work until that last sonogram or not, I wasn't sure.

Q Between September 13, 2006 and October 11, 2006 did you speak with anybody at UPS?

A I spoke to Ursala, that's when I brought in my doctor's note, in the air office.

Q You spoke to Ursala or Teresa?

A Yes, but I'm pretty sure it was Ursala because she sent me to –

MS. GUSTAFSON: Excuse me. I missed something. What time period are we talking about [145] right now?

MR. McGEE: Between September 13, 2006 –

MS. GUSTAFSON: Okay.

MR. McGEE: – and October 11, 2006.

BY MR. McGEE:

Q Correct, Ms. Young?

A Correct.

Q Did you speak with anybody other than Ursala or Teresa, whoever that was on the day you actually went to the building, between September 13, 2006 and October 11, 2006?

A I know I called Carol Martin. I'm trying to recall if I talked to her or not. I know I left a message – I believe I did get ahold of her or she called me back – and I was concerned about my benefits because I knew I'd used all my FMLA leave.

Q So you're saying you actually spoke with Carol Martin?

A I believe she called me back. Not at [146] that time. I left numerous messages, yes.

Q Numerous messages for whom?

A Just throughout the whole time. Carol Martin.

Q Did you leave any other messages for Carol Martin other than the one you just described at any time between September 13, 2006 and October 11, 2006?

A I'm sure I called her. I couldn't tell you how many times. I know I did at least once.

Q My question is, did you leave any messages for Carol Martin other than the one you've just described at any time between September 13, 2006 and October 11, 2006?

A Every time I called I left a message.

Q Okay. That's not my question. Did you leave any messages for Carol Martin other than the one you've described during the time period between September 13, 2006 and October 11, 2006?

A Yes.

Q What other occasions did you call Carol [147] Martin's office during that period of time?

A I cannot give you specific dates.

Q But you're certain it was before October 11, 2006?

A Yes.

Q Why were you calling Carol Martin at that point in time?

A Because I was concerned about my benefits and I knew that my FMLA leave had expired.

Q Other than the conversation with either Teresa or Ursala Blunt when you went to the D.C. building in September of 2006 did you actually speak with anyone between September 13, 2006 and October 11, 2006?

A Are you asking me at the building?

Q Anybody at UPS, either in person or by telephone.

A Between September – August 23rd and September –

Q No, between September 13, 2006 and [148] October 11, 2006.

A Did I speak to anybody other than Ursala?

Q Ursala or Teresa when you went to the building that day.

A I spoke – I'm pretty sure I spoke to Carol Martin.

Q You're pretty sure you spoke with Carol Martin prior to October 11, 2006?

A Yes.

Q And is that because you called her?

A Yes. I don't know if she answered the phone and I left a message – if she answered or I left a message.

Q So you don't know if you reached her or she called you back; is that what you're saying?

A Yes.

Q And tell me about the conversation that you had with Carol Martin that was prior to October 11, 2006.

A I told her I knew that I had used up all [149] my FMLA leave, I was concerned about my benefits, that I had another doctor's appointment scheduled for the 11th for another ultrasound, and I really wasn't ready to come back to work quite yet. And she sounded like she was – didn't know what to do with me, like I was an odd case.

Q Well, don't tell me what she sounded like. Tell me what you said and tell me what she said.

A I just told her that I had gotten another doctor's note and I was just worried about my benefits because I knew that my FMLA leave had expired and I needed to know what to do.

Q What did Carol Martin say to you during that conversation?

A She really wasn't sure what to do with me at that point.

Q That's what she said?

A At that point, yes.

Q She said to you, "I don't know what to do with you"?

[150] A Yeah, she sounded confused.

Q Okay. I don't want you to tell me what she sounded like, okay? I want you to tell me what she said, the words that came out of her mouth.

A I can't remember specific, every single word she said verbatim.

Q Just tell me as best as you can recall what she said. I don't want you to characterize the tone of her voice. I want you to tell me as best as you recall what she actually said.

A I believe she said that I'd used up all my FMLA leave and that I needed to bring in a doctor's note with my restrictions or whether I could come back if I wanted to come back to work or not. I don't think she said that, but I had to have a doctor's note to come back to work. I know I had to have a note; I know she told me about a note.

Q So she told you you had to have a doctor's note that either released you to return [151] to work or that if you couldn't return to work what your restrictions were?

MS. GUSTAFSON: Objection, mischaracterization of the testimony.

BY MR. McGEE:

Q I'm just asking, is that what she told you?

A But I wasn't trying to return to work at that time, but if I had to, then I would because needed to keep my benefits. I was just worried about my benefits.

Q I understand what you were worried about. I want you to tell me what Carol Martin said to you.

A I know it was a conversation about my doctors' notes.

Q What did she say about a doctor's note?

A That I needed to bring in a doctor's note –

Q For what purpose?

A – with my restrictions. I know it was [152] with my restrictions, something with my restrictions.

Q Because you told her you were not ready to return to work at that point, correct?

A Yeah, but if I had to work, I could, I wanted to; I didn't want to lose my benefits.

Q You told her that during that conversation?

A I told her that I didn't want to lose my benefits and that I – you know, I would do what I needed to do to keep my benefits.

Q But you didn't tell her you were prepared to come to work if you .had to to keep your benefits? You didn't tell her that, did you?

A No, I just wanted to make sure that – I wanted to keep my benefits.

Q Because at that point you were not ready to come back to work, were you?

A No.

Q Because you were still fearful that if you came back to work you might be required to do [153] something –

MS. GUSTAFSON: Objection to the form of the question, these leading questions.

MR. McGEE: Yes, they are, correct.

BY MR. McGEE:

Q You were still concerned at that point given where you were in your pregnancy that you might be jeopardizing the pregnancy if you returned to work?

A It was at the same time as my first miscarriage, yes.

Q Do you believe that your first miscarriage was in any way caused by anything that you did at UPS?

A No.

Q Did either you or Carol Martin say anything else other than what you've just told me in that conversation that you had with her prior to October 11, 2006?

A No. I believe I faxed her the note or she got it from Ursala; I'm not sure on that

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[155] Q Did you have any other conversations with anybody at UPS other than what you've just described between July 15, 2006 and October 11, 2006?

A No.

Q Did you make any effort or have any interest in returning to work at any time prior to October 11, 2006?

A No.

Q And you had another doctor's appointment on October 11, 2006?

A Yes, the doctors wanted to see me a second time because of the prior miscarriage.

Q Did you actually see a doctor on October –

A Yes.

Q Excuse me. Did you actually see a doctor on October 11, 2006?

A October 11th, yes.

Q Did you see a doctor or did you see Cynthia Shaw?

[156] A I'd seen a doctor as far as I know.

Q Pardon?

A I'd seen a doctor as far as I know.

Q Who was the doctor?

A The doctor that I'd seen. Everybody that I've seen there I assume they're doctors.

Q Well, Cynthia Shaw's a midwife, isn't she?

A I did not know that.

Q Do you know what a midwife is?

A I do know what a midwife is.

Q Okay. A midwife's not a doctor, is it?

A No, but I didn't know that she was just a midwife.

Q But Cynthia Shaw is the person that you saw on October 11, 2006?

A I would assume, yes.

Q And what was the purpose of that visit?

A That was a second ultrasound from the previous, September 13th.

Q And what were the results of that [157] ultrasound?

A It was very good, very promising. The baby was growing really well, the heartbeat was strong.

Q And did you get a note signed by – by Cynthia Shaw?

A Yes.

Q Okay. Did you ask for a note?

A Yes.

Q Why?

A Because – now because the baby was doing so well, I was kind of feeling good about the pregnancy, I didn't really have any more fears because I was past a – I guess you would say a breaking point, and I felt good about coming back to work.

Q And did you have any discussions with Cynthia Shaw or anybody else about what the doctor's note or what the note would say?

A No. I told her that I worked – I did let her know that I worked at UPS, that my weight [158] requirement was 70 pounds, and she just recommended that, you know, you really shouldn't lift anything over 20 pounds. She said you probably could, but she just recommended me not to.

Q Did she tell you why she recommended you not lift over 20 pounds?

A I could probably throw my back out if I didn't lift it properly or whatnot.

Q It had nothing to do with the pregnancy; is that what you're saying?

A No.

Q Okay. Well, you could throw your back out every day, can't you?

A I guess it did have – your body is changing and stuff, so I guess you would say yeah, it did have something to do with my pregnancy.

Q She told you that you could be endangering the fetus if you lifted over 20 pounds, didn't she?

A No, she did not tell me I could endanger [159] my fetus at all.

Q Well, that's what you understood, wasn't it?

A No.

Q Why did she put the 20-pound lifting restriction in?

A I don't know why she put 20 pounds.

Q You didn't talk to her about that?

A No. I got a note so I could come back to work. I was told to bring in a note –

Q Did you read the note?

A Yes.

Q Did you know why she said you shouldn't lift over 20 pounds?

A No, she didn't say why she recommended me not to lift over 20 pounds.

Q Did you know why she recommended you not lift over 20 pounds?

A No.

Q Why didn't you ask her?

A Because I said I needed a note for work

* * *

[162] throw your back out?

A Well, women, when they're pregnant, their bodies change. I would assume that, yes. I'm not the doctor. I did not write the note.

Q But that was your assumption, correct?

A That was my assumption, yes.

Q Your assumption is she was concerned about you throwing your back out?

A She was recommending that, yes, that I didn't do it, so yes, I would assume that that's why she did.

Q Very good. But you didn't have any discussion with her about that?

A No. I was asked to bring in a doctor's note with my restrictions.

Q Okay. When was the next time that you spoke with anybody at UPS after October 11, 2006?

A At the end of October I called Carol Martin, I know I left I message, and I'm pretty sure she called me back because I wanted to come back to work.

[163] Q When you say the end of October, when?

A Sometime in the end of October. I couldn't pinpoint the day.

Q The last week of October?

A Maybe the third week.

Q But you're not sure?

A No.

Q What telephone did you call her from?

A I called her from my cell phone.

Q And you left a voice message?

A Yes.

Q What did the voice message say?

A I explained that I got a note with my restrictions and that, you know, I felt good about my pregnancy and that I wanted to come back to work and I needed to know what I had to do.

MS. GUSTAFSON: Mr. McGee, I want you to be able to choose a good breaking point, but at some point I will need a break for lunch.

MR. McGEE: No, absolutely.

BY MR. McGEE:

[164] Q And how long after you left that message for Carol Martin toward the end of October was it that she called you back?

A I believe she called me back that same day.

Q What did you say to Carol Martin when she called you back?

A That I just had an ultrasound, that it was very encouraging, that I really wanted to come back to work, I needed to know what they needed from me, that I had lifting restrictions recommended to me.

Q Did you tell her what the lifting restrictions were?

A Yes.

Q What did you tell her?

A I said it has a recommended weight lifting of 20 pounds, and she stated to me that they don't offer light duty for pregnancy, only for on-the-job injuries.

Q Did she say anything else?

[165] A That I wouldn't qualify for short-term disability because my doctor didn't give me a note saying that I couldn't work, that I just had a lifting restriction.

Q Did Carol Martin say anything else during that conversation?

A She said that I wouldn't qualify for short-term disability because I wasn't disabled because I could work. She seemed confused to me.

Q Don't tell me –

A Okay.

Q Right now I want to know what she said.

A Okay. And she told me that, you know, I've used all – up all of my FMLA leave and that I might want to think about my employment with UPS, and I asked, I said, you're saying that because I'm pregnant I have to quit my job.

Q And she told you no, that's not what I'm saying?

A She said, well, that's not what I'm implying. I said, well, that's what I took it as.

* * *

[173] back.

Q Did you follow up with her after you e-mailed it to her?

A No, because I just assumed that she would call me and tell me. You know, I gave her my e-mail address. I figured if she was going to write me a letter that she would have e-mailed it back to me.

Q Did you ever give Carol Martin any doctor's note?

A I believe I faxed her the October 11th note.

Q But you're not sure?

A I believe I faxed it to her, yes.

Q How did you fax it to her?

A On a fax machine from my home.

Q And what – do you have a record of that?

A No.

Q Why not?

A My fax machine doesn't always give us a

* * *

[180] Back on the record. Do you want to give your – we're not changing the tape so you don't need to give any indication?

THE VIDEOGRAPHER: (Indicating no.)

BY MR. McGEE:

Q Ms. Young, prior – at any time prior to April 2007 had you consulted with any doctor or medical service provider in connection with your pregnancies or childbirth who were not military doctors or military personnel?

A Prior to 2007?

Q Prior to April 2007.

A Yes, I had.

Q Okay. Who and when?

A In 2005 with my first pregnancy I was going to see a civilian doctor.

Q Who was that?

A I don't recall the doctor's name.

Q You were going to see one or you did see one?

A I did see one, yes.

[181] Q In connection with what?

A My pregnancy. That's where I found out that I had a miscarriage.

Q Okay. At any time between then and April of 2007 did you consult with any doctor or medical provider in connection with any pregnancy, attempted pregnancy, childbirth, or planned child birth?

A No.

Q Why not?

A Well, attempted pregnancy, I had to go to Andrews Air Force Base to get referred to Walter Reed.

Q Well, Andrews Air Force Base is a military installation, isn't it?

A Yes.

Q Okay. My question is, did you consult with or attempt to consult with or communicate with any doctor or medical service provider that was not a military personnel?

A No.

* * *

[186] A It was after my October 11th note, I do know that.

Q Well, you told me that the telephone conversation that you had with Carol Martin was at the end of October 2007 (sic), so how could you have spoken

with Carol – with Ursala Blunt after that at the beginning of October 2007 (sic)?

A I may have mistaken my dates. It's not fresh in my mind.

Q Okay. Let me ask the question again. When was the next time after your telephone conversation with Carol Blunt – excuse me – Carol Martin at the end of October 2007 (sic) that you spoke with anybody about coming back to work or your interest in coming back to work at UPS?

A I spoke with Ursala Blunt after October 11th, a few days after I received my doctor's note, about wanting to come back to work and about seeing if they had anything light duty for me to do. I never received a phone call back. After October 11th –

[187] Q Well, excuse me. Did you speak with Ursala Blunt or not?

A I just said I spoke with Ursala Blunt.

Q You said you never received a call back. What does that mean?

A I spoke with her telling her that I had a doctor's note recommending me not lift over 20 pounds, that my ultrasound was very good, and that I would like to come back to work but I had a recommendation of not lifting anything over 20 pounds, that if there was anything light duty that I could do, I wanted to work if I couldn't do my regular job.

Q Was that – it was a telephone conversation?

A Yes.

Q Was that before or after your telephone Conversation with Carol Martin about that issue?

A That was before.

Q And what telephone did you use to make that call to Ursala Blunt?

[188] A My cell phone. I called her cell phone.

Q And you actually spoke with her?

A Yes.

Q How long did –

A Actually, it was not a phone call. I gave her the doctor's note.

Q What do you mean it wasn't –

A It wasn't a phone call. I gave her the doctor's note.

Q Did you call Ursala Blunt or not?

A No. I gave her the doctor's note; I'd seen her in person.

Q Did you ever have any telephone conversation with Ursala Blunt about coming back to work or expressing any interest in coming back to work?

A When I spoke with her, when I gave her the note, that she would call – she said she would call me

back and let me know. When she called me back, she told me I had to speak to Carol Martin.

* * *

[192] have been a problem for me to do my regular job.

Q Okay. I'm not asking whether it would have been a problem. I'm asking you, tell me what you told Ursala Blunt.

A I told her that I wanted to come back to work.

Q Did you say anything else?

A She said she'd see if there was any light duty – no, she didn't – that I had to contact Carol Martin.

Q Did you say anything else to Ursala Blunt?

A No.

Q Did Ursala Blunt say anything else to you?

A Not that I recall.

Q Did you give Ursala Blunt a copy of the October 11th doctor's note?

A Yes.

Q After that meeting with Ursala Blunt in the D.C. building, when was the next time that you [193] spoke to anybody about coming back to work or expressing any interest in coming back to work at UPS?

A That's when I spoke to Carol Martin.

Q That's the conversation you've already told us about before the lunch break, correct?

A Yes.

Q And that's the one that occurred at the end of October 2006?

A I believe it was the end. It could have been in the middle. I don't recall the specific date.

Q After that telephone conversation with Carol Martin, when was the next time that you spoke to anybody about coming back to work at UPS or expressing an interest in coming back to work at UPS?

A I spoke with Tony Pender and I spoke with Myron Williams.

Q What was the next conversation that you had after the telephone conversation with Carol [194] Martin where you expressed to anybody an interest in coming back to work at UPS?

What I'm trying to get you to do is put them in chronological order. So when I ask you about the next, I don't want you to list all the conversations you had, I want you to tell me which was the next one.

A I spoke to Tony Fender, then I spoke to Myron Williams.

Q Did you call Tony Pender?

A Yes.

Q It was a telephone conversation?

A Yes.

Q Using what phone?

A My cell phone.

Q And where did you call Tony Fender?

A At the union.

Q And you spoke with him?

A I don't recall if I spoke with him or he called me back, but I did speak with him.

Q Okay. So around that time you actually

* * *

[204] A After I had Triniti, yes.

Q And did you just show up one day without talking to anybody about it?

A I guess after my – before I had Triniti – after I had Triniti, I called the air office because I did not know – I did not know how long they give for maternity leave.

Q But you had no other conversations with anybody about coming back to work or expressing an interest in coming back to work prior to the birth of your child, correct?

A No.

Q That's correct, correct?

A That I recall.

Q And when was the birth of your child?

A April 29th.

Q And when was the first conversation after the birth of your child that you had with anybody about coming back to work at UPS or expressing any interest in coming back to work at UPS?

[205] A I can't recall. I do know that I called Cici to find out how much maternity leave they allow. I don't recall if I even spoke to anybody. I do know that – I don't recall if I spoke to Jim Harris or not.

Q What did Cici Richardson tell you?

A She wasn't sure about how long. She thought it was six weeks that you could be out for maternity leave.

Q Well, you had already used up all your FMLA leave, correct?

A Correct. I said maternity leave. Isn't that what you – or whatever they call it after you have your baby.

Q Well, is there any type of leave for maternity leave if it's not FMLA leave?

A I don't know. That's what I needed to find out. Do you have a baby on Tuesday and go to work Wednesday? I don't know. That's what I was trying to find out.

Q Did you have any approved leave of [206] absence at this point in time?

A To my knowledge, no. I attempted short-term disability in January once I found out that my medical benefits were no longer.

Q All right. When was the next conversation after the birth of your child that you had with anybody about coming back to work or expressing an interest in coming back to work?

A I don't know the specific dates or who I spoke to about coming back to work.

Q Well, did you talk to anybody about coming back to work prior to actually showing up?

A Once again, I don't recall if I spoke to Jim Harris or not. I do know that I needed a doctor's note to come back to work.

Q How did you know that?

A You always need a note with full restrictions if you want to work. That's just common knowledge in UPS.

Q Did you get a doctor's note –

A Yes.

* * *

[208] A No.

Q Full duty release?

A Yep. Yes. I'm sorry.

Q What did you do with that doctor's note?

A The day I returned to work I brought it with me.

Q What day did you return to work?

A I believe it was June 26th.

Q '07?

A Yes.

Q Why did you bring the doctor's note with you when you returned to work?

A Well, whenever you're out any amount of period they always want a doctor's note.

Q And who did you give the doctor's note to?

A I didn't give it to anybody.

Q Why not?

A Nobody asked me for it.

Q But nobody asked you to bring it to work that day, did they?

[209] A No.

Q But you brought it to work?

A Yes.

Q So why didn't you give the doctor's note to somebody?

A Because nobody asked me for it.

Q So what did you do with the doctor's note?

A I folded it up and put it in my pocket.

Q What was the first day that you actually wanted to return to work at UPS after giving birth to your child?

A Probably the first part of June.

Q And did you tell – what effort did you make to return to work?

A I didn't because I was under the assumption that you got six weeks' maternity leave after you have a child.

Q Well, when was the first time after the birth of your child that you told anybody at UPS that you wanted to come back to work?

[210] A I didn't tell anybody at UPS except for Cici. And like I said, I had a conversation with Jim Harris, but I don't remember when. I was trying to find out how much leave and whatnot that I had, you get after you have a child because I didn't know.

Q Okay. Did you return to work at UPS after the birth of your child as soon as you wanted to return to work?

A Yes. I could have come back sooner if they wanted me to, but I couldn't get any answers as to how much leave you got after having a child.

Q Well, who did you ask that question to?

A I asked Cici.

Q She's a – she's a bargaining unit employee, correct?

A And I believe, like I said, I had a conversation with Jim Harris. When, where, how, I don't remember.

Q But you returned as soon as you wanted to?

[211] A Yes.

Q And Bill Riggins was the new supervisor when you returned to work?

A Yes.

Q And when you returned to work, what was your job?

A The same job that I had before, I was doing Annapolis.

Q Doing Annapolis meaning?

A Delivering in Annapolis my EAMs as normal.

Q And also – were you also meeting a package car driver at a meeting point to help him make his deliveries, him or her?

A I believe we were still doing meeting points there, yes.

(Thereupon, Exhibit No. 1 was marked for identification.)

BY MR. McGEE:

Q Ms. Young, I'm going to hand you what have marked as Young Deposition Exhibit No. 1,

* * *

[221] A Yes.

Q When – after you found out that you were not going to be returning to work at UPS did you make any efforts to find a job or employment or work elsewhere while you were pregnant?

A No.

Q Why not?

A First of all, there's – my 20 years of working part-time jobs, there's no other part-time job that offers the benefits that UPS offers. I was just so sick that UPS wouldn't let me work when I could work. By this time, I was showing and most people don't want to hire a pregnant woman. And I planned on coming back to UPS, so why would I find another job, get trained at, and when I had my child, I planned on going back to?

Q Well, you've worked more than one job at a time, haven't you?

A Yes.

Q Okay. Well, while you were working at UPS, you would work at UPS and then go to another [222] job, correct?

A Correct.

Q So you wouldn't have to quit at your other job simply because you were returning to work at UPS, would you?

A With the hours that I had to work, possibly.

Q What do you mean? You held down two jobs at one time, you worked at UPS and then you left there and went to work at Floral Express?

A I was at Floral Express while I was working with UPS, yes.

Q Right. I meant you started your day in the morning going to your job at UPS and once you finished that you went to your job at Floral Express?

A Correct.

Q So you can hold – you're a part-time employee at UPS, you can have – you know, you work at UPS and then also hold another job at the same time, correct?

* * *

[227] A I've always had benefits but not the better benefits through UPS.

Q The sooner you got back to work at UPS the sooner you would have had the UPS benefits, correct?

A Correct.

Q So why didn't you go back to work right after the birth of your child?

A I felt as though I should have the maternity leave like every other pregnant woman to spend time with their child and bond with their child before they have to return to work.

Q What maternity leave does every other pregnant employee or every other mother at UPS get?

A I don't know. There's something in the bargaining agreement. I don't know what it says about it.

Q What did you do between October 11th, '06 and the birth of your child?

A I delivered flowers until January.

* * *

[233] Q Are there any other jobs at UPS that you claim that you could have done while you were pregnant?

A I could have performed my regular job. Those are all that I can think of right now.

Q Were there any job openings in the small sort area of the D.C. building?

A I wasn't pertaining to try and switch to jobs unless they made me do it or that I could.

Q No, that wasn't my question. My question was, were there any job openings in the small sort area of the D.C. building at the time?

A I don't know. You'd have to check with the manager.

Q Were there any job openings at the car wash?

A I don't know. You'd have to check with the management.

Q Were there any clerical job openings at the time?

A I don't know. You'd have to check with [234] management.

Q Were there any job openings for scanning packages?

A I don't know. You'd have to check with management.

Q As a part-time employee did you have a right to bump anybody – an incumbent out of any job?

A They can move you anywhere they want to put you. It's not a matter of you bumping them. If management wants you somewhere, they will put you there.

Q So in other words if you work in the small sort area you don't have a right to continue to work in the small sort area, you can be put anyplace that management wants you or needs you, including –

A No, because small sort people cannot drive.

Q I'm sorry, a nondriving position. So when you said that they can put you anywhere you

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[250] Q Okay. We already – we already listed that.

A None that I can recall at this time.

Q If there's anything else, will you tell me?

A Yes.

Q What do you believe that Carol Martin would have done if you had hurt yourself exercising at the gym and presented a doctor's note with a 20-pound lifting restriction?

A I don't know because I'm not Carol Martin, I don't know all UPS's policies, and it's never happened to me.

Q Do you have any reason to believe that Carol Martin would not have treated that situation the exact same way she treated your situation?

A I don't know. I can't speak for Carol Martin.

Q Do you have any reason to believe that she would have treated that situation differently?

A I don't know. I cannot speak for Carol [251] Martin.

Q So you don't have any reason. Let me ask you this, do you have any evidence, facts, information, or anything at all that would support a claim that Carol Martin would have treated that situation differently?

A Once again, I cannot speak for Carol Martin. I do not know Carol Martin's job.

Q But you're trying to speak for Carol Martin in this case, aren't you? Aren't you trying to tell me what you think the real reason for her decision was?

A I didn't say anything about Carol Martin. I'm just telling you my experience and what I was told and how I was handled.

Q Well, Carol Martin's the one that told you – you told me that Carol Martin was the one that told you that you couldn't come back to work?

A Correct, because I was pregnant.

Q She didn't tell you – she told you you couldn't come back to work because your lifting

* * *

[253] Q Do you know what Carol Martin's motivation was?

A Once again, I cannot speak for her.

Q I'm not asking you to speak for her.

A I do not know what her motivation is.

Mr. McGee, on my pregnancy, I wasn't allowed to have short-term disability because my doctor said I could work.

Q You weren't disabled, were you?

A No, I never claimed to be disabled.

Q Okay. Well –

A UPS perceived me as disabled.

Q But you're not entitled to short-term disability benefits unless you're disabled, are you?

A According to UPS policies, I would assume so, yes.

Q You would assume that you're not entitled to –

A I was told –

Q – short-term disability benefits if

* * *

[258] Q When?

A I can't recall the time.

Q Okay. That's after you told her that you had restrictions, correct?

MS. GUSTAFSON: Objection, mischaracterization.

THE WITNESS: I told her that my doctor recommended me, but I was told to bring in a note with my restrictions.

BY MR. McGEE:

Q Right. And that's at the point in time when you told her you're not ready yet to return to work after the September 13 doctor's note?

A No, that was the time of my FML – August 23rd.

Q And at that point you had restrictions?

A Because I was told to get restrictions and I wasn't quite ready to come back to work yet.

Q And you told her that you weren't ready to come back to work yet?

A Correct.

[259] Q And you told her that you didn't want to come back to work yet, correct?

A Correct, in August.

Q And she said in that case, then bring in a doctor's note with any restrictions, correct?

A Yeah, bring in a doctor's note with any restrictions.

Q Right. And when you returned to work after the birth of your child you brought in a doctor's note, correct?

A Correct.

Q It didn't have any restrictions in it, did it?

A No.

Q That's because you didn't have any restrictions at that point, correct?

A Correct.

Q In – after you became pregnant, do you believe that you could have performed all the essential functions of your job without any restrictions at all?

[260] A Yes.

Q Why didn't you bring in a doctor's note to that effect?

A I was doing what I was instructed by Carol Martin, to bring in a note with my restrictions. That's what I remember her telling me.

Q And that's what she told you in August – in August of 2006?

MS. GUSTAFSON: Objection, mischaracterization –

MR. McGEE: Excuse me.

MS. GUSTAFSON: – of prior testimony. There's been a lot of testimony about when she said that to her.

BY MR. McGEE:

Q You just told me that's what she told you in August of 2006 when you told her that you were not yet ready to come to work, correct?

A Correct.

Q Did you ever – after Carol Martin told you that you could not return to work, which you

* * *

[264] November I was still trying to come back to work, I wanted to work.

Q Okay. And why didn't you get a full duty release from the doctor?

A Because nobody at UPS advised me if I brought in a note with no restrictions that I could come back to work. I was under the impression because of my conversation with Carol Martin and Myron Williams that because I was pregnant is why I couldn't work, not because of my limitations.

Q A lot of pregnant women work, don't they?

A Yes.

Q A lot of pregnant women work at UPS, don't they?

A I don't see too many of them, no.

Q Do you have any facts, evidence, information, or anything at all that would support a claim that Carol Martin would have treated – if you had come in

with a – if you had hurt yourself [265] exercising at the gym and had presented a doctor's note saying you had a 20-pound lifting restriction that Carol Martin would have treated you any differently than she treated you when you brought in the doctor's note with the restriction in connection with your pregnancy?

A I cannot speak for Carol Martin. I don't know how she would handle the situation.

Q And you don't have any evidence to suggest that she would handle it differently, do you?

A I don't know.

Q If a male employee had injured himself playing basketball on the weekend and presented a doctor's note with a 20-pound lifting restriction, what would Carol Martin have done?

A I don't know. I can't speak for Carol Martin.

Q Do you have any facts, evidence, information, or anything at all to support a contention that Carol Martin would have treated [266] that situation differently than she treated your situation?

A I don't know. I cannot speak for Carol Martin.

Q If a male employee had a hernia, a ruptured hernia, as a result of something that happened outside of work and had presented a doctor's note with a 20-pound lifting restriction, what would Carol Martin have done?

A I don't know. I cannot speak for Carol Martin.

Q Do you have any evidence, any facts, any information, or anything at all to suggest or support a claim that Carol Martin would have treated that situation differently than she treated your situation?

A I don't know. I cannot speak for Carol Martin.

Q If an employee, a male employee, a male EAM driver had a gallbladder operation –

MS. GUSTAFSON: I object also to the

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[303] A No.

Q Do you know if Carol Martin was involved in or aware of her situation?

A I do not know.

Q Do you know who Chaz Berry is?

A Chaz I believe is the airport supervisor.

Q Do you know any employees by the name of Dawn or Lauren who work under him?

A The names sound familiar.

Q Do you know whether any of those employees or anybody else was given any type of job accommodation, light duty, or alternative work?

A I don't know.

Q Do you know of any employees who had lifting restrictions for reasons other than an on-the-job

injury who were given light duty, alternative work, or other job accommodation?

A Could you repeat the question, please?

Q I'll have the court reporter read it [304] back.

(Thereupon, the record was read as requested.)

THE WITNESS: Quatrice Pendleton was.

BY MR. McGEE:

Q And you've told me about everything you know about her situation, correct?

A Yes.

Q Anyone else?

A Not that I can recall at this time.

Q If you do recall anybody else, will you let me know?

A I will, yes. The only other person would be Cici, but –

Q Cici?

A Cici, but I don't believe that she had a light duty note.

Q Other than the people that you've identified and we've discussed, are you aware of anybody else who was given light duty, alternative work, or any type of job accommodation for any

* * *

[308] tion?

MR. McGEE: Are you claiming that that's a different act of discrimination or are you claiming that's just damages as a result of the decision not to allow her to return to work?

MS. GUSTAFSON: Both, that it was discriminatory – it relates to both damages and discrimination.

BY MR. McGEE:

Q Who made the –

MS. GUSTAFSON: She has testified to it previously today.

BY MR. McGEE:

Q Who made the decision that you were not eligible for short-term disability?

A Carol Martin spoke to me when she told me on the phone that I would not or could not – would not qualify for short-term disability because my doctor still said I could work.

Q When did you first file a claim for short-term disability?

[309] A January of '07.

Q And was that claim for short-term disability benefits denied?

A Yes.

Q W denied it?

A Aetna.

Q Why did Aetna deny it?

A Because they said it was past the 90-day period.

Q In other words that your claim was untimely?

A Correct.

Q Do you deny that your claim was untimely?

A I was told that, by Carol Martin, that I would not qualify for short-term disability because my doctor's note did not say I could not work.

Q That wasn't my question. My question is, do you deny the fact that your claim for short-term disability benefits was untimely?

[310] A According to Aetna, yes.

Q Do you disagree with Aetna's decision?

A Decision to what?

Q The decision that your claim was untimely.

A Do I agree with their decision?

Q Yes.

A No.

Q Do you believe that your claim was timely?

A From the knowledge that I knew I should file short-term disability, yes.

Q Okay. And why do you claim it was timely?

A Because when I spoke with Ms. Martin in October – when I spoke with Ms. Martin in October, she said I would not qualify for short-term disability because my doctor said I could work, that I was not disabled.

Q Do you believe that Aetna denied your claim because you were pregnant, that that was the [311] reason they denied your claim?

A The only reason – the only reason I was given why my claim was denied, because it was untimely.

Q Do you have any reason to believe that that wasn't what Aetna actually relied on to deny your claim? In other words, do you believe that they actually denied it for some other reason than what they told you?

A I don't know.

Q Do you believe that Aetna actually denied your claim for short-term disability benefits because you're a female or because you were pregnant?

A I don't know their policies on when they deny claims.

Q Do you have any facts, information, evidence, or anything at all that would support a claim that Aetna or anybody else denied your claim for

short-term disability benefits because you're a woman or because you were pregnant?

[312] A I do not know what basis Aetna denies claims, approves claims. I don't know.

Q I know you don't know why they did it. My question is, do you have any facts, information, evidence, or anything at all that would support a claim that that decision was made because you're female or because you were pregnant?

A I have no facts, no.

Q Anything else, facts, information, evidence, anything at all to support a claim that that decision was made because you're a female or because you were pregnant?

A Once again, I don't know what they conclude, whether somebody qualifies for short-term disability or not. I don't know their policies, I don't know their procedures.

Q I wasn't asking you whether you knew their procedures or policies. I understand that you don't know their –

A Okay.

[313] Q – procedures or policies. I understand that you've said that at least.

My question is, do you have any facts, evidence, information, or anything at all that would support the

decision – a claim that that decision was made because of your sex or your pregnancy?

A No.

Q Do you believe that anyone at UPS mistakenly regarded you as having a disability while you were pregnant?

A I'm not sure I understand your question.

Q Well, you don't claim that you had an actual disability, correct?

A No, I was not disabled. Maybe after my pregnancy.

Q Do you believe that anybody at UPS mistakenly regarded you as being disabled while you were pregnant?

A I can't speak for what anybody regarded me as.

[314] Q Do you have any reason to believe that anybody regarded you – mistakenly regarded you as disabled while you were pregnant?

A Well, UPS regarded me as disabled because they would not let me work. I did not regard myself as disabled, UPS did, because they –

Q Who at UPS did?

A Whoever codes us in the computer, because I was coded as disabled. I don't know who puts that information in the computer.

Q Do you believe that anybody at UPS mistakenly regarded you as being substantially limited in any type of major life activity while you were pregnant?

A I would say UPS perceived me that way.

Q Who at UPS perceived you that way?

A Carol Martin perceived me that way.

Q Perceived you in what way?

A I was told to – I was told that because I had a recommendation of light duty work that I [315] would not qualify for short-term disability, so that if I got a doctor's note saying I couldn't work that I could more than likely qualify for my short-term disabilities.

Q I understand that. My question was, what do you claim Carol Martin perceived you – your condition to be?

A She perceived me, I assumed, as disabled.

Q Well, she told you you weren't disabled, right?

A Well, that's what she said, but that doesn't mean she didn't perceive me that way.

Q What makes you believe that she perceived you as disabled even though she told you that you weren't disabled?

A Because my leave was extended from the end of September till October.

Q And what about the fact that your leave was extended makes you believe that Carol Martin perceived you as disabled?

* * *

[320] Q And why do you think UPS as a company in general – how does a company rather than a person perceive somebody as being anything?

A Because that's what I was told I was coded in the computer, as disabled. I never said I was disabled, UPS coded me that way, so I don't know who's behind the coding.

Q So your claim that you were perceived as disabled is based on the fact that somebody entered you into the attendance system or gave you an attendance code corresponding to disabled?

A Correct.

Q Is your claim that you were perceived as disabled based on anything other than that coding?

A I never claimed I was disabled.

Q Is your claim that you were regarded as disabled based on anything other than the fact that somebody coded you in the attendance record as an 18 corresponding to disabled or disability?

MS. GUSTAFSON: Other than what she's already testified to today?

* * *

[324] aware.

MR. McGEE: All right. Why don't we ask her to come back in.

(Thereupon, the witness rejoined the proceedings.)

BY MR. McGEE:

Q I want to – because I'm confused, let's start over on this, okay? Do you believe that any person at UPS, an individual, regarded you as being disabled or substantially limited in any major life activity while you were pregnant?

A I cannot speak for other people's thoughts. UPS, as far as I was concerned, coded me as disabled although I was not disabled. As far as who, I don't know who.

Q Other than the fact that you – somebody coded you as disabled, to use your terminology, do you have any reason to believe that anybody at UPS regarded you as disabled or unable to or substantially limited in any major life activity while you were pregnant?

[325] A Well, whoever's doing the coding had to get information from somebody. Who that lines go down, I don't know.

Q I understand that. Other than the fact that somebody coded you as disabled in the system, do you have any facts, information, or anything else that you

rely on to support a contention that anybody at UPS regarded you as disabled while you were pregnant?

A Once again, I don't know how they got the conclusion I was disabled. I spoke with Ursala Blunt, I spoke with Myron Williams, I spoke with Carol Martin, I spoke with Tony Pender. I told every last one of them that I was willing to work, I was willing to do my job, I was willing to do my regular job, I was willing to do a light duty job. As far as the disabled part, I can't speak on UPS's part.

Q And you don't know who coded you as disability?

A Once again, no, I do not.

* * *

[330] requested.)

THE WITNESS: My managers and my supervisor knew.

BY MR. McGEE:

Q Knew what?

A That my doctor recommended me not lift anything over 20 pounds.

Q That wasn't my question. My question was not who knew what your doctor's note said. The question was, did anybody at UPS regard you as having a restriction greater than a 20-pound lifting restriction?

A I guess the wording of the question is confusing me because it said did UPS regard me with a restriction greater than 20 pounds while I was pregnant, correct?

Q Do you want the court reporter to read the question back for you?

A Yes.

MS. GUSTAFSON: If you don't understand the question, just tell him you don't understand

* * *

[337] regarded you as having any type of limitation or restriction on any type of activity other than a lifting restriction?

A I don't know that UPS – any other activity? I assume that they did because, like I said, my doctor recommended 20 pounds, I could have done more, UPS wouldn't let me do my regular stuff, so they would have perceived me I guess that I had more.

Q That you had a greater restriction on your lifting ability than the doctor said, correct?

A Hm-mmm.

Q Okay. My question is, other than the lifting restriction did anybody at UPS regard you as having any other type of restriction or limitations on your activities other than the lifting restriction that you've just described?

A No.

Q Did anybody at UPS – and is it your belief that UPS regarded you as having this [338] lifting restriction because you were pregnant?

A Because of my in vitro cycle.

Q But during the course of your pregnancy, correct?

A Could you repeat the question for me?

Q Do you believe that anybody at UPS thought that this restriction on your ability to lift was the result of anything other than your in vitro fertilization or pregnancy?

A It was through my in vitro process, yes.

Q And do you believe that they thought this lifting restriction was a result of anything other than the in vitro process or the pregnancy?

A Anything else, no.

Q So they – you believe that they regarded you as having a greater lifting restriction but they understood that that was in connection with either your in vitro or your pregnancy, not as a result of anything else?

A Well, my greater lifting restriction, there wasn't a greater. I could have at least [339] lifted 20 pounds.

Q Yes, but they regarded you – you just told me that you thought that they regarded you as having a greater restriction, meaning more restrictive.

A During my in vitro cycle, yes.

Q Did anybody regard you as having a permanent lifting limitation or restriction?

A Permanent, no.

Q So it was just temporary in connection with your in vitro and –

A Just my in vitro, not my pregnancy. A greater restriction during my pregnancy.

Q And you're claiming that –

A Well, UPS must have thought I couldn't lift anything more during my pregnancy because they wouldn't allow me to work.

Q I understand. And you believe it's because of that misperception of your ability that you weren't allowed to return to work; is that what you're claiming?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG	:	
	:	
v.	:	Civil Action No.
	:	DKC-08-2586
UNITED PARCEL SERVICE	:	
OF AMERICA, INC., et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this discrimination action are: (1) a motion to dismiss for lack of subject matter jurisdiction (Paper 35) filed by Defendant United Parcel Service, Inc. ("UPS"); (2) a motion to clarify, motion for reconsideration in part, and request for hearing (Paper 25) filed by Plaintiff Peggy Young; (3) a motion for protective order (Paper 27) filed by Defendant; (4) a motion to leave to file a second amended complaint and request for hearing (Paper 30) filed by Plaintiff; and (5) a motion for sanctions filed by Defendant (Paper 42). The issues are fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary.

I. Background

Plaintiff Peggy Young, a Caucasian female, has been employed as an early morning driver by Defendant United Parcel Service ("UPS") since October 23, 1999. During the summer of 2005, Plaintiff was attempting to get pregnant through in vitro fertilization

("IVF"). Plaintiff was out of work on leave related to this pregnancy attempt. In October 2005, Plaintiff suffered a miscarriage and returned to work. Plaintiff thereafter had a second round of IVF treatments that were not successful. In July 2006, Plaintiff went on unpaid leave to undergo another IVF process. The IVF treatment was successful and Plaintiff became pregnant.

In October 2006, Plaintiff was ready to return to work. She provided a note to UPS Occupational Health Manager Carol Martin ("Martin") from her doctor stating, "Peggy Young is currently pregnant and due to deliver on or about May 2, 2007. Due to her pregnancy it is recommended that she not lift more than 20 pounds." (Paper 4 ¶ 14). Martin replied that Plaintiff could not come back to work during her pregnancy because, due to the lifting restriction, Plaintiff could not perform the essential functions of her regular job as a driver. Martin also told Plaintiff that she was not qualified to receive disability benefits because she was not disabled under the terms of the UPS health plan. Martin further advised Plaintiff that she could not work because light duty positions were not available for pregnancy. Such positions were only available to employees injured on the job or to employees with disabilities under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Plaintiff remained on unpaid leave of absence for the remainder of her pregnancy. After the birth of her child in April 2007, Plaintiff returned to work as a driver in June 2007.

On July 23, 2007, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of race, sex, and pregnancy. The EEOC issued Plaintiff a right to sue letter on September 2, 2008. Plaintiff filed this action on October 3, 2008 against UPS of America, Inc., UPS, Inc., UPS Health Program, Aetna Life Insurance, and Aetna Disability and Absence Management alleging violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, and 42 U.S.C. § 1981.[1] (Paper 1). On October 29, 2008, Plaintiff filed an amended complaint against UPS, Inc. and UPS America, removing the ERISA claim and seeking damages and equitable relief for alleged violations of Title VII, the ADA, and § 1981. (Paper 4). Defendants filed an answer on December 8, 2008 (Paper 7), and a scheduling order was entered the same day. (Paper 8). Defendant UPS of America, Inc. was dismissed from the case on December 17, 2008. (Paper 14).

Plaintiff served her First Set of Interrogatories and First Set of Document Requests on Defendants on December 15, 2008. Defendant responded on January 20, 2009. Defendant also served two supplemental responses to Plaintiff's First Set of Interrogatories

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[1] Defendants UPS Health Program, Aetna Life Insurance, and Aetna Disability and Absence Management were dismissed from the case on October 30, 2008. (Paper 5).

and responded to Plaintiff's Second Set of Interrogatories. On May 14, 2009, Plaintiff filed a motion to compel responses to interrogatories and document requests. (Paper 18).On May 26, 2009, the court granted in part and denied in part Plaintiff's motion to compel. The same day, Plaintiff served on Defendant her notice of deposition pursuant to Fed.R.Civ.P. 30(b)(6) and scheduled UPS's deposition for June 9, 2009. Defendant's counsel, Ernest McGee, asserts that he informed Plaintiff's counsel that he was not available on June 9 and would need a considerable amount of time to prepare for the deposition. In response to Plaintiff's notice of deposition, Defendant filed a motion for protective order on June 3, 2009. (Paper 27). Plaintiff filed a motion for leave to file second amended complaint on June 6, 2009. (Paper 30). On June 10, 2009, Defendant filed a motion to modify amended scheduling order, requesting that the court extend discovery and dispositive pretrial motions deadlines to accommodate the scheduling of Defendant's 30(b)(6) deposition, the motion for protective order that Defendant filed in connection with that deposition, and the motion for leave to file a second amended complaint.(Paper 31).The court granted Defendant's motion and ordered that new deadlines would be set following resolution of the pending motions. (Paper 32).

II. Motion to Dismiss

A. Standard of Review

Motions to dismiss for lack of subject matter jurisdiction are governed by Fed. R. Civ. P. 12(b)(1). The plaintiff bears the burden of proving that subject matter jurisdiction properly exists in the federal court. *See Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999). In a 12(b)(1) motion, the court "may consider evidence outside the pleadings" to help determine whether it has jurisdiction over the case before it. *Richmond, Fredericksburg & Potomac R.R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991); *see also Evans*, 166 F.3d at 647. The court should grant the 12(b)(1) motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond*, 945 F.2d at 768.

B. Analysis

In order for the court to hear certain types of employment-related claims, a plaintiff must first exhaust her administrative remedies. Exhaustion of administrative remedies requires that a plaintiff file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and receive, or be entitled to receive, a right to sue letter before filing a federal claim. 42 U.S.C. § 2000e-5(b), 16(c). "[T]he purpose of the exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the

employer." *Frank v. England,* 313 F.Supp.2d 532, 536 (D.Md. 2004)(quoting Wade v. *Sec'y of the Army,* 796 F.2d 1369, 1377 (11th Cir. 1986)). "[A] failure by the plaintiff to [first] exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim." *Jones v. Calvert Group, Ltd.,* 551 F.3d 297, 300 (4th Cir. 2009). As explained by the United States Court of Appeals for the Fourth Circuit in *LaPorte v. Henderson,* 176 F.Supp.2d 464, 468-69 (4th Cir. 2001):

> Good faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information is all that exhaustion requires." *Wade v. Sec'y of the Army,* 796 F.2d 1369, 1377 (11th Cir. 1986). Thus, where an agency or the EEOC requests information relevant to resolving the employee's complaint and the employee fails to provide that information, the employee has failed to exhaust his administrative remedies. *See Washington v. Nordstrom, Inc.,* 2001 WL 282699, *3 (D.Md. 2001) (concluding that plaintiff failed to exhaust administrative remedies when plaintiff failed to respond to EEOC's request for additional information regarding discrimination claims); *Crawford v. Babbitt,* 186 F.3d 1322, 1326-27 (11th Cir. 1999) (concluding that plaintiff failed to exhaust administrative remedies when plaintiff failed to provide information relevant to claim for compensatory damages); *Barnes v. Levitt,* 118 F.3d 404, 408-10 (5th Cir. 1997) (stating that a claimant may

> not refuse to provide requested information, wait for 180 days to pass, and then invoke the jurisdiction of the federal court, because such a claimant has failed to exhaust his administrative remedies); *Briley v. Carlin*, 172 F.3d 567, 571 (8th Cir. 1999) ("In order to exhaust administrative remedies, the claimant is required to demonstrate good faith participation in the administrative process, which includes making specific charges and providing information necessary to the investigation.").

Defendant asserts that Plaintiff's complaint should be dismissed for lack of subject matter jurisdiction because Plaintiff refused to cooperate meaningfully with the EEOC's administrative process and, as a result, has not exhausted her administrative remedies. Specifically, Defendant contends that Plaintiff failed to submit the requested rebuttal to Defendant's position statement and, instead, requested a notice of right to sue from the EEOC. Plaintiff responds, incorrectly, that exhaustion of administrative remedies is not a jurisdictional requirement. Plaintiff further responds that the EEOC was unable to investigate her claim within the 180-day timetable. Plaintiff insists that the EEOC ignored her requests to identify the EEOC investigator responsible for her claim and that she was unable to pursue her claim with the agency.

As noted above, Plaintiff filed a charge of discrimination with the EEOC on July 23, 2007. Plaintiff subsequently filed an amended charge of discrimination in

January 2008. Plaintiff describes her remaining interaction with the EEOC as follows. A mediation scheduled for March 2008 was canceled.[2] Plaintiff's counsel emailed the EEOC in April, May, and June 2008 attempting to identify the EEOC investigator so that the investigator could schedule an interview with Plaintiff. The emails were never answered and the identity of the EEOC investigator was not provided. Plaintiff visited the EEOC in June 2008 attempting to identify her EEOC investigator, but did not succeed. Plaintiff's counsel received from the EEOC on July 25, 2008 a letter enclosing a copy of UPS's position statement, and requesting that Plaintiff's attorney submit a written rebuttal no later than July 31, 2008. By this time, Plaintiff's counsel concluded that the EEOC could not be relied on to conduct a diligent and timely investigation. As a result, instead of submitting a written rebuttal, Plaintiff requested a notice of right to sue and filed this action on October 3, 2008.

Although Defendant insists that Plaintiff failed to pursue her claim before the EEOC, indeed Defendant appears to have caused the delay that prompted Plaintiff to pursue her claim in court instead of

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[2] Defendant contends that mediation was scheduled for April 9, 2008 and did not occur because Plaintiff canceled, noting that "settlement at this time is unlikely and that mediation is therefore not in my client's best interest. The mediation will increase Complainant's attorney's fees making any future settlement possibility even more difficult." (Paper 42, Ex. 1, Gustafson Email).

continuing the administrative process. On October 30, 2007, Judy Cassell, Supervisory Investigator for the EEOC sent Plaintiff's counsel a letter outlining the next steps in the administrative process. The letter explained:

> During the next 60-90 days, members to [sic] the Enforcement Team will be managing the initial part of the investigation. First, follow-up will occur with the Respondent (employer) as to its position statement based on the allegations set forth in the charge of discrimination. Second, upon receipt of the position statement, you will either be contacted by telephone to review the contents of the position statement or sent a copy of the position statement in order to allow you the opportunity to provide a rebuttal. Third, once EEOC has received the position statement and your rebuttal (or the due date for your rebuttal has come and gone without receipt of a rebuttal from you), the case will be reviewed and assigned to an Investigator for further investigation.

(Paper 38, Ex. C).

The same day, Ms. Cassell sent Defendant a letter reminding Defendant that the EEOC had not yet received its position statement (initially requested October 4, 2007) and requesting Defendant's response to the charge of discrimination no later than November 16, 2007. (*Id.* Ex. B). The letter also informed Defendant that if it was interested in engaging in a settlement conference, it must notify the EEOC by

November 9, 2007. There is no evidence that Defendant notified the EEOC of its interest to engage in a settlement conference before this deadline or of its intent not to file a position statement. However, a settlement conference was scheduled for April 2008 and, and as noted above, Plaintiff decided not to participate in the settlement conference. Plaintiff was not informed that attending the conference was mandatory and her decision not to attend was not fatal to her claim. *Halasi-Schmick v. City of Shawnee, Kan.*, 759 F.Supp. 747, 750 (D.Kan. 1991) (finding that the plaintiff's failure to attend investigatory conference was not a "deliberate bypass" or "thwarting" of administrative proceedings and denying the defendant's motion for summary judgment on grounds that plaintiff has failed to exhaust administrative remedies). Defendant did not file its position statement until June 11, 2008, nearly seven months after the EEOC's first request, and almost one year after Plaintiff's first charge of discrimination. Plaintiff did not receive the position statement until July 25, 2008, over a year after filing her first charge.

Defendant cites a number of cases where the court held that the employee's abandonment of the discrimination claim resulted in a failure to exhaust administrative remedies. *See, e.g., Bell v. Manugistics Group, Inc.*, No. 06-941, 2006 WL 1494560 (D.Md. May 26, 2006) (stating a plaintiff's failure to provide rebuttal information during the course of a four year investigation constituted failure to exhaust administrative remedies); *LaPorte v. Henderson*, 176

F.Supp.2d 464, 468 (D.Md. 2001) (finding that a plaintiff's failure to provide evidence of emotional distress was tantamount to failure to exhaust administrative remedies), *aff'd*, 45 Fed.Appx. 250 (4th Cir. 2002)(unpublished); *Washington v. Nordstrom, Inc.*, 00-2522, 2001 WL 282699, at *2-3 (D.Md. Mar. 19, 2001) (finding that a plaintiff's unexplained failure to respond to two requests for information from the EEOC prevented investigation of her claims, resulting in dismissal for failure to exhaust administrative remedies).

The cases cited by Defendant are inapposite. None of these cases involve a plaintiff who decided to forego administrative proceedings because *the defendant* failed to cooperate meaningfully. "[T]his case does not fall within the ambit of those cases precluding suit in the district court by virtue of a final agency decision ensuing upon a claimant's own default." *McRae v. Librarian of Congress*, 843 F.2d 1494, 1496 (D.C. Cir. 1988). Rather, Plaintiff diligently pursued her claim in good faith, but after waiting nearly a year for a response from Defendant and not receiving any information from the EEOC regarding the investigator assigned to her claim, Plaintiff decided to pursue her claim in court. Accordingly, Defendant's motion to dismiss for lack of subject matter jurisdiction will be denied.

III. Motion to Amend/Correct Amended Complaint

Plaintiff filed a motion for leave to file a second amended complaint on June 6, 2009. (Paper 30). The scheduling order unambiguously stated that all motions for amendment of pleadings were due by January 22, 2009. (Paper 16). Plaintiff's motion triggers both Fed.R.Civ.P. 15(a) governing amendment of pleadings, and Fed.R.Civ.P. 16(b) governing modification of a scheduling order. Fed.R.Civ.P. 15(a) provides that leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 16(b) governs the modification of a scheduling order. "[A]fter the deadlines provided by a scheduling order have passed, the good cause standard must be satisfied to justify leave to amend the pleadings." *Nourison Rug Corp. v. Parvizian,* 535 F.3d 295, 298 (4th Cir. 2008). The good cause inquiry primarily "focuses on the timeliness of the amendment and the reasons for its tardy submission" and in particular, on "the diligence of the movant." *Rassoull v. Maximus, Inc.,* 209 F.R.D. 372, 374 (D.Md. 2002).

Plaintiff seeks to amend her complaint to add disparate impact and disparate treatment claims under the Pregnancy Discrimination Act. Plaintiff asserts that she "learned through discovery that UPS treats pregnant women less well " with regard to short-term disability benefits.(Paper 30, at 7). Plaintiff seeks to amend her complaint to add a disparate treatment claim regarding short-term disability benefits. In addition, Plaintiff asserts that, through

discovery, she learned of an additional policy or practice that has a disparate impact on pregnant women: that UPS permits temporary or light duty or alternate work for employees who sustain on-the-job injuries or who fail the Department of Transportation exam due to medical conditions or who lose their driver's license because of an alcohol-related driving conviction. (*Id.* at 8-9). Plaintiff seeks to amend her complaint to add this disparate impact claim.

Plaintiff asserts that she included a disparate impact claim and a disparate treatment claim in her original and first amended complaints, and now she is merely amplifying these claims. Plaintiff states that her original disparate impact claim consisted of the following factual allegations:

> 42. UPS maintains a pattern of discrimination in employment on the basis of sex.
>
> 43. UPS has a requirement that early morning drivers – such as Ms. Young – must be able to lift 70 pounds.
>
> 44. As an early morning driver, Ms. Young's deliveries tended to be almost all lightweight envelopes of not more than a few pounds. She almost never, if ever, was required to lift more than 20 pounds and almost never, if ever, was required to lift 70 pounds.
>
> 45. *The 70-pound requirement* for early morning drivers does not accurately measure one's ability to perform the job and *is not a business necessity* for the position.

> 46. *The 70-pound requirement* for early morning drivers *operates to discriminate against women, particularly pregnant women,* and it discriminated against Ms. Young when she was pregnant.

(Paper 30, at 6) (citing Paper 1 III 42-46; Paper 4 ¶¶ 29-33) (emphasis in original).

Defendant contends that the court does not have subject matter jurisdiction over Plaintiff's purported disparate impact claim because Plaintiff did not exhaust her administrative remedies. (Paper 27, Attach. 1, at 9-12). Defendant points out that Plaintiff's EEOC complaint did not contain any allegations to support a disparate impact claim. (Paper 27, Attach. 7).

Plaintiff's complaint is not a model of clarity and Defendant understandably concluded from her complaint and first amended complaint that she intended to bring a disparate treatment claim. In Plaintiff's original and first amended complaints, Plaintiff's mere mention of the seventy pound lifting requirement falls woefully short of pleading a disparate impact claim. While there are two theories of recovery under Title VII, disparate impact claims differ from disparate treatment claims in many significant ways. As noted by Judge Gregory:

> Disparate impact and disparate treatment are two legally distinct causes of action under Title VII. Disparate treatment requires the plaintiff to prove that the defendant had discriminatory intent or motivation. *See*

> *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 986, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). In contrast, disparate impact seeks to ferret out employment practices that are the functional equivalent of intentional discrimination because they cause significant adverse effects on protected groups, but have no deliberate discriminatory motive. *Id.* at 986-87, 108 S.Ct. 2777.

Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 282-83 (4th Cir. 2005) (Gregory, J., dissenting in part). Plaintiff's first amended complaint, which is not divided into separate counts or claims, does not contain the phrase "disparate impact." Nor would such a claim survive a motion to dismiss for failure to exhaust administrative remedies, as Defendant argues in its motion for a protective order. Each claim must be separately exhausted before being raised in a suit before the district court. *See, e.g., Garrett v. Fed. Exp. Corp.,* 2008 W.L. 2365020 (N.D.Okla. 2008). Thus, Plaintiff did not originally plead a disparate impact claim and her attempt to add any other disparate impact claim would be futile.

Additionally, Plaintiff knew or should have known that she had potential additional disparate treatment claims related to her pregnancy discrimination claim when she filed her original complaint and first amended complaints. Plaintiff's claims are grounded in the allegations that she was discriminated against as a result of her pregnancy. Plaintiff reasons that she should be able to amend her complaint to include

a new disparate treatment claim because she only recently obtained information, through discovery, regarding short-term disability benefits. Plaintiff knew, before discovery, that short-term disability benefits could be a possible issue in this case, because she had previously filed a lawsuit based on UPS not granting her short-term disability benefits. *See, Young v. United States of America, Inc. et al.*, No. 08-cv-00105 (E.D.V.A. Feb. 4, 2008). Plaintiff has failed to show good cause for her undue delay in attempting to add this new claim, more than four months after the deadline for amendment of pleadings, especially in light of the prejudice that would inure to Defendant. In fact, Plaintiff does not even address the good cause standard of Rule 16(b), which governs her motion under these circumstances. Accordingly, Plaintiff's motion for leave to file a second amended complaint will be denied.

IV. Motion to Clarify/Motion for Reconsideration

Plaintiff requests clarification of five aspects of the court's May 26, 2009 Memorandum Opinion. Specifically, Plaintiff asks that the court make explicit that:

> (1) UPS shall have a deadline for producing the information the Court has compelled,
>
> (2) confidential information should not be redacted from UPS's production, in view of

> the Court's entry of the stipulated protective order,
>
> (3) that UPS must provide the available information as to the weight of the packages, and
>
> (4) that UPS must provide complete information about alternative work assignments.

(Paper 25, at 1). Additionally, Plaintiff asks the court to reconsider "that Plaintiff's complaint filed October 3, 2008 (and amended October 29, 2008), pleaded a cause of action under the Pregnancy Discrimination Act." (*Id.*).

Defendant counters that Plaintiffs' requests should be denied. First, Defendant argues that Plaintiff's request that UPS be required to respond to the court's Order by June 7, 2009 is unreasonable and overly burdensome. (Paper 33, at 3). Second, Defendant asserts that the court's May 27, 2009 stipulated protective order does not justify or require the disclosure of sensitive and confidential information, such as the identities or home addresses of Plaintiff's co-workers, to Plaintiff or her attorney. (*Id.* at 5-8). Third, Defendant contends that Plaintiff is not entitled to information regarding employees who were given alternative work assignments because they lost their ability to drive. (*Id.* at 8-10). Defendant notes that the court limited the scope of Plaintiff's written discovery requests to those employees who have been given an alternative work assignment for an on-the-job injury or an accommodation under the ADA. (*Id.* at 8).

Finally, Defendant argues that Plaintiff's request for a hearing should be denied because the court already determined that a hearing on the motion to compel was unnecessary.

The court's responses to Plaintiff's motion to clarify are as follows: First, Plaintiff's request to move up the production deadline is moot. Second, at this juncture, discovery regarding other employees who took pregnancy-related leave is being collected for the purpose of statistical information, so the parties' court-approved confidentiality agreement will not be modified as long as Defendant uses a letter or number identifier for each employee. If it becomes necessary at a later point for Plaintiff to gather confidential information regarding an employee's identity, the court will reconsider this issue. Third, Defendant will be directed to respond as to why it has or has not produced the six months' worth of data it has regarding the weight of the packages that Plaintiff delivered. Fourth, the court expressly stated that information regarding employees assigned to "inside jobs" because they lost their certification from the Department of Transportation and were unable to drive was irrelevant. (Paper 19, at 15). As stated before, Plaintiff's discovery requests will be limited to those employees who have been given an alternative work assignment for "light work" because of an on-the-job injury or an accommodation under the ADA. Finally, Plaintiff pleaded a cause of action under the Pregnancy Discrimination Act in her complaint and amended complaint. Plaintiff's complaint and

amended complaint cited 42 U.S.C. §§2000e *et seq.* The Pregnancy Discrimination Act was added to Title VII as subsection (k). After that amendment, pregnancy discrimination is considered a species of illegal sex discrimination.

The court has determined that a hearing on Plaintiff's motion is unnecessary, so Plaintiff's motion for a hearing will be denied. Plaintiff's motion to clarify and motion for reconsideration in part will be granted in part and denied in part as stated herein.

V. Motion for Protective Order

Fed.R.Civ.P. 30(b)(6) provides parties with the ability effectively to depose an entity regarding matters that are within its knowledge. Rule 30(b)(6) states:

> A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters

known or reasonably available to the organization.

The Fourth Circuit has explained that discovery requests may, however, be limited:

> On its own initiative or in response to a motion for protective order under Rule 26(c), a district court may limit "the frequency or extent of use of the discovery methods otherwise permitted" under the Federal Rules of Civil Procedure if it concludes that "(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(2). Further, upon motion of a party and "for good cause shown," the court [in which the action is pending or, on matters relating to a deposition,] in the district in which a deposition is to be taken may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that the discovery not be had. Fed.R.Civ.P. 26(c).

Nicholas v. Wyndham Int'l, Inc., 373 F.3d 537, 543 (4th Cir. 2004).

Plaintiff's deposition notice lists fifty-one different subject matters on which she seeks to require Defendant to designate representatives to testify. Defendant has requested a protective order, pursuant to Fed.R.Civ.P. 26(c), to quash the deposition noticed by Plaintiff, on the ground that the notice is overly broad, unduly burdensome, seeks irrelevant information, and lacks the reasonable particularity required by Fed.R.Civ.P. 30(b)(6). Defendant asserts that many of the listed subject matters are vague and ill-defined. Defendant seeks a protective order limiting Plaintiff's inquiry into thirty-seven of the fifty-one subject matters Plaintiff has listed in its deposition notice. Request numbers 24-35, 36-37, 39, 41-45, 48, and 50-51 are not in dispute.

The subjects into which Plaintiff may inquire in the 30(b)(6) deposition must not be overbroad and must be limited to a relevant time period, geographic scope, and related to claims for which Plaintiff has exhausted her administrative remedies.

First, some of the matters on which Plaintiff seeks to depose Defendant's 30(b)(6) designate are overbroad or vague. Plaintiff will be prohibited from asking about the matters in request numbers 1-4, 22-23, 31-33, 38, and 46-47.

Plaintiff is prohibited from asking about matters that are not related to claims in her amended complaint, such as short-term disability leave and UPS's assignment of alternate work to employees who lost their driver's licenses or failed the DOT exam.

Plaintiff will be prohibited from asking about the matters in request numbers 39-40.

On the matter of a relevant time period, Plaintiff's claims relate to how she was treated by Defendant in relation to her pregnancy, which occurred during the time period of October 11, 2006 to April 29, 2007. The court has previously narrowed some discovery requests to the operative time period of January 1, 2006 through December 31, 2007. Likewise, Plaintiff's 30(b)(6) deposition inquiries must be limited to a reasonable time period. Defendant asks for request numbers 5-11, 13-23, 26-28, 30, 33-35, 38, and 49 to be limited to the January 1, 2006 through December 31, 2007 time period. Plaintiff responds that a five-year time period is necessary for sixteen of those requests so that Plaintiff may compare her treatment to similarly situated people; those sixteen requests are numbers 15-20, 22-23, 26-28, 30, 33-35, and 38. Plaintiff additionally contends that the matters involved in request numbers 5-11 and 13-14 are policies that were adopted before 2006. Plaintiff also asserts that request numbers 21 and 49 should not be restricted to a particular time period, because they concern data about Plaintiff's own deliveries and hours worked. Plaintiff's inquiries will be limited to the time period of January 1, 2006 through December 31, 2007 for request numbers 15-20, 26-28, 30, 34-35. Plaintiff's inquiries will not be limited to a particular time period for request numbers 5-11, 13-14, 21, and 49.

Furthermore, Plaintiff's claims also are only related to her employment in Defendant's Metro D.C. District, which had its own local collective bargaining agreement that governed the terms and conditions of Plaintiff's employment, including her eligibility for an alternative work assignment. (Paper 27, Attach. 1, at 8).Therefore, Plaintiff's 30(b)(6) deposition inquiries must be limited to subjects that are related to Defendant's policies and actions that occurred in the Metro DC District. Plaintiff contends that no geographical limit can be placed on request numbers 5-11 or 13-14 because they are company-wide matters. Plaintiff's inquiries will be limited to the Metro D.C. District for request numbers 15-20, 26-29, and 34-35. Additionally, the court previously limited Plaintiff's written discovery requests for information regarding employees who took pregnancy-related leave to the geographic area of the D.C. Building, where Plaintiff worked. Likewise, Plaintiff's inquiries will be limited to the D.C. Building for requests regarding employees who took pregnancy-related leave.

Therefore, Defendant's motion for a protective order will be granted to prohibit Plaintiff's inquiries regarding requests numbered 1-4, 22-23, 31-33, 38-40, and 46-47, to limit Plaintiff's inquiries regarding requests numbered 15-20, 26-30, and 34-35, to the January 1, 2006 to December 31, 2007 time period, and to limit Plaintiff's inquiries regarding requests numbered 15-20, 26-30, and 34-35 to the DC Metro District and any requests regarding employees who took pregnancy-related leave to the D.C. Building.

VI. Motion for Sanctions

Rule 11(b) provides, in part:

> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper – whether by signing, filing, submitting, or later advocating it – an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery[.]

"The decision to impose sanctions under Rule 11 . . is within the sound discretion of the trial court." *See, e.g., Ost-West-Handel Bruno Bischoff GMBH v. Project Asia Line, Inc.,* 160 F.3d 170, 177 (4th Cir. 1998).

Defendant seeks sanctions pursuant to Fed.R.Civ.P. 11 for Plaintiff's continued pursuit of a claim under

the ADA.[3] Defendant argues that pregnancy is not recognized as a disability under the ADA. Defendant insists that sanctions are warranted for Plaintiff's continued pursuit of this baseless claim.

Defendant answered the Amended Complaint and no motion to dismiss or for summary judgment has been filed concerning the ADA claim. Thus, the claim remains a part of this litigation. The court declines to consider the merits of the sanctions motion until the ADA claim is resolved:

> Courts should, and often do, defer consideration of certain kinds of sanctions motions until the end of trial to gain a full sense of the case and to avoid unnecessary delay of disposition of the case on the merits. This is a sensible practice where the thrust of the sanctions motion is that institution of the case itself was improper. See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1337, at 121 (2d ed.1990).

Lichtenstein v. Consolidated Services Group, Inc., 173 F.3d 17, 23 (1st Cir. 1999). Accordingly, Defendant's motion for sanctions will be denied without prejudice to renewal.

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[3] Defendant served the motion for Rule 11 sanctions on Plaintiff on June 10, 2009, and filed the motion on July 2, 2009. (Paper 42). Plaintiff was not required to respond to Defendant's motion because the court did not direct her to do so. Local Rule 105.8(b).

VII. Conclusion

For the foregoing reasons, Defendant's motion to dismiss will be denied, Plaintiff's motion to amend will be denied, Plaintiff's motion to clarify or reconsider and for a hearing will be granted in part and denied in part, Defendant's motion for a protective order will be granted, and Defendant's motion for sanctions will be denied. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG	:	
	:	
v.	:	Civil Action No.
	:	DKC-08-2586
UNITED PARCEL SERVICE	:	
OF AMERICA, INC., et al.	:	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 30th day of March, 2010, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion to dismiss for lack of subject matter jurisdiction (Paper 35) filed by Defendant UPS BE, and the same hereby IS, DENIED;

2. The motion to leave to file second amended complaint and request for hearing (Paper 30) filed by Plaintiff BE, and the same hereby IS, DENIED;

3. The motion to clarify, motion for reconsideration in part, and request for a hearing (Paper 25) filed by Plaintiff Peggy Young BE, and the same hereby IS, GRANTED in part and DENIED in part;

4. Defendant is directed to respond as to why it has or has not produced the six months' worth of data it has regarding the weight of the packages that Plaintiff delivered;

5. The motion for protective order (Paper 27) filed by Defendant BE, and the same hereby IS,

GRANTED to prohibit Plaintiff's inquiries regarding requests numbered 1-4, 22-23, 31-33, 38-40, and 46-47, to limit Plaintiff's inquiries regarding requests numbered 15-20, 26-30, and 34-35, to the January 1, 2006 to December 31, 2007 time period, and to limit Plaintiff's inquiries regarding requests numbered 15-20, 26-30, and 34-35 to the DC Metro District and any requests regarding employees who took pregnancy-related leave to the D.C. Building;

6. The motion for sanctions filed by Defendant (Paper 42) BE, and the same hereby IS, DENIED without prejudice; and

7. The clerk will transmit copies of this Memorandum Opinion and Order to counsel for the parties.

/s/
DEBORAH K. CHASANOW
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff, vs. UNITED PARCEL SERVICE, INC., Defendant.	)	Civil Action No. DKC 08CV2586

* * *

The deposition of MARK BRIEN was taken on Tuesday, May 4, 2010, commencing at 9:20 a.m., at the offices of Sharon Fast Gustafson, 4041 North 21st Street, Arlington, Virginia, before Beverly J. Mahoney, CCR No. 7040232, Notary Public.

* * *

[12] THE WITNESS:

And then we have other property that's owned by the company but it's not operated out of, it's either leased or operated by somebody else.

BY MS. GUSTAFSON:

Q. Jessup, Maryland, would that have been?

A. Jessup is a trailer shop.

Q. Okay.

A. Jessup, Savage.

Q. Describe for me, if you will, the company's policy with regard to light duty assignments or temporary alternate work. And you can say if that's the same or different, and then describe the policy or policies.

A. Okay. We call it temporary alternate work, because light duty makes a distinction that you are doing less than what you normally do. Temporary alternate work is someone that's doing a position within certain restrictions where they can do the regular job.

Under the collective bargaining agreement with the union we have positions called temporary alternate work, where if someone is injured on the job is given, for instance, weight restrictions, [13] we can bring them back into the building and have them work within those weight restrictions, like a work hardening, in order to get them back up to their regular duties so they can come back to work and do their regular job again.

Q. Was the phrase work hardening?

A. Yes. If someone has a 20 pound weight restriction, by having them come to work and do an aspect – or do a different type of job, that actually helps them build their muscles or build up, you know, whatever has been injured, to be able to get them to come back to their regular job, and to be able to not have weight restrictions, or come back up to their normal job responsibilities.

Q. What if someone is – strike that. What are the situations in which someone might be given temporary alternate work?

A. Okay. If it's an on the job injury, for instance, to give an example, a package car driver injured his back, goes to the medical center and gets a 20 pound weight restriction, it's to the [14] company's advantage to get that person back in working rather than to be paying them sitting at home. Plus, it gets them back to work quicker if they are continually coming to work each day.

Q. And what other situations, other than on the job injuries, are employees given temporary alternate work?

A. That would be the only time, unless something came under Americans With Disabilities Act, where we were required that a reasonable accommodation was made for a person, and we were directed to bring that person back in a different capacity than what their normal job would have been.

Q. What are some of the situations where employees – tell me a situations you are aware of where employees were given reasonable accommodations.

A. Now, again, I deal with the health and safety side of it, on the workers comp and auto liability side. So I deal basically with those people that have had on the job injuries, and [15] bring them back to work,

temporary alternate work, as soon as possible. Again, with direction from their doctors.

Carol Martin handles all the ADA side of it. So if someone was injured off the job and had some kind of restriction and they couldn't return to work, or filed for FMLA, or ADA, Carol would handle that whole side of it.

Q. Okay. What are the situations known to the company in which people have been given temporary alternate work due to disabilities under the ADA?

A. I am not aware of any. Again, like I said, I handle the workers comp end of it and the TAW, or temporary alternate work side.

Q. You do understand, Mr. Brien, when I ask you what they are that I'm not asking you just what you personally are aware of, but the information that is known to the company.

What have you done in preparation for the deposition to learn what is known to the company as to what disabilities people have had for which [17] which people have been given temporary alternate work?

A. No, I am not. And again, that might not be communicated to me. Again, Carol would have more depth of knowledge in that subject than I would.

Q. What about employees given temporary alternate work for high blood pressure, are you aware of that being done?

A. That does happen. And again, that would happen through a DOT physical, where a driver goes and has to get a physical on a regular basis. Depending on what the doctor says, sometimes they will get a card for a month, three months, a year. A maximum, I believe, under the DOT physical is a two year card.

So if someone goes to get their DOT physical and they are failed for high blood pressure, they have the option to come inside and work an inside job until they can get their blood pressure under control and go back and pass a DOT physical. At that point they would be placed back [18] into their position that they were, that they passed the DOT physical for.

Q. Do you know the names of any persons who have had high blood pressure and taking inside jobs for that reason?

A. No.

Q. What about for vision problems?

A. No, I don't know any names personally, no.

Q. Are you aware of the fact that similarly, as for high blood pressure, for vision problems employees sometimes come inside and do temporary alternate work?

A. No, I am not aware of any vision problems.

Q. Are you aware of any other conditions, physical conditions, for which an employee may not pass the DOT test and may temporarily do temporary alternate work?

A. I can't think of anything off the top of my head. I think the high blood pressure ones are probably the one we see that's most common.

[19] Q. But you don't know the name of anybody?

A. No.

Q. Do you –

A. Again, those cases are referred to Carol, and Carol would take care of that at that point.

Q. What is your job title?

A. I'm the Health and Safety Manager for the district.

Q. What's the name of your district now?

A. Chesapeake.

Q. How long have you had – how long have you worked at UPS?

A. 24 years.

Q. In what role did you begin your working for UPS?

A. I actually started back in 1986 as a package car driver delivering in Northeast, D.C. I drove for about 14 months. I know when I came to UPS that I wanted to go into management. I had owned a business before, so I knew that's what I wanted to do.

I was promoted into what they call an On [20] Road Supervisor in the Burtonsville facility. I worked as an On Road Supervisor for I'm going to say three or four years.

And then I was asked to take over the Air Center in Burtonsville and set up the Air Center in Burtonsville. I worked that for a year or two, and then I was moved into Human Resources.

Once in Human Resources I started out hiring for the Burtonsville twilight hub, hiring part-timers for the inside operations loading and unloading our trailers.

I was Human Resources Rep for I want to say about two years, and then became the Health and Safety Supervisor. I remained Health and Safety Supervisor, you know, I was in charge of the same thing basically that I'm doing now, but just at a different level, for about two or three years.

And then I was promoted to the Training and Development Manager, again staying in Burtonsville this whole time. I was a Training and Development Manager for a couple of years, and [21] then went into being the Workforce Planning Manager.

I was in charge of all the hiring of employees for the district. I had a number of supervisors working for me. And after being the Workforce Planning Manager for a couple of years, was sent on a special assignment to the Corporate Office. It was called the Damage Reduction Group.

I was in that special assignment for about a year, and came back to the district in Workforce Planning, and then was moved over to the Employee Relations Manager, basically the job that you talked to Frankie about, I was doing that job for a couple of years, and then came back –

Q. Excuse me for interrupting. But you talked a little faster than I could write or think, so I'm going to –

A. I'm sorry. I will slow down a little bit.

Q. That's okay. You were the Workforce Planning Manager for two years, and then you went on a special assignment to the Corporate Office in

* * *

[31] bargaining agreement the person who cannot drive because of high blood pressure does not get temporary alternate work, is that your testimony?

A. Correct.

Q. Okay. What is it that the person who cannot drive because of high blood pressure gets?

A. They come inside and work an inside job, whatever job is available that the operation has room to put them into. And they will work inside until they are able to go back and get their DOT physical and be able to drive again. They actually have the ability to displace an inside employee.

Q. But isn't it also true that frequently they don't have to displace anybody, they simply get some of the work that is available inside?

A. Usually there will be positions available that they can just slide into.

Q. What are those positions?

A. It could be anything from a loader to an unloader, to a sorter. If there is a building with a hub, they could work within the hub on the [32] same type of positions.

Most of the time in our facilities it's either a preloader or a hub operation that those people are working, because that's where most of the need is.

Q. As a matter of fact, they might move into any job that's on the inside, is that correct?

A. Any union job, yes.

Q. It is true, is it not, that there was a time when the employee who had high blood pressure and couldn't drive because of it did not get inside work?

A. Not to my knowledge.

Q. To your knowledge, the employee who couldn't drive due to a physical condition, such as high blood pressure, was always given inside work?

A. Correct.

Q. When did the first collective bargaining agreement provide for this?

A. I'm not aware. As I said, as long as I've been with the company I have knowledge that

* * *

[34] Q. What was the reason that the policy was enacted?

A. Again, I wasn't part of putting that policy together, so I can't really answer that.

Q. Was there every a time at UPS that a woman who was temporarily unable to drive for reasons related to a pregnancy was permitted to do inside work?

A. Again, not to my knowledge.

MR. MCGEE: Unable to drive? Do you mean disqualified from driving, is that the question?

MS. GUSTAFSON: I believe the question was asked and answered. I'm sorry. Can you please repeat the question.

(The record was read as requested.).

BY MS. GUSTAFSON:

Q. I believe you have answered the question.

A. I thought you meant where the person that was pregnant had some type of restrictions. I'm not aware of anybody that's been pregnant that's been offered inside work because of being pregnant, I'm not aware of anything.

[35] Q. And what if they were given some sort of restrictions, is it the same answer, or a different answer?

A. If they were given some type of restrictions, then again it would fall under Carol. It would go to Carol and would fall under either ADA, or FMLA, or whatever.

I mean, it would be the same as if I'm playing basketball and I hurt my back and get a 20 pound weight restriction, it's an off the job type of injury.

I would not be offered temporary alternate work. I would have to go through Carol and file for either an ADA accommodation or disability.

Q. But the person who has diabetes and cannot drive for some period related to diabetes, what happens to him?

A. Diabetes, again what would happen is the same way, it would go to Carol, and Carol would determine the condition, you know, is this person able to drive or not to drive.

* * *

[40] pregnant woman who is given some part of restriction come up in any of that training?

A. Specifically about a pregnant woman, I'm not sure what training – where that would be included. Again, the Injured Employee Process talks about TAW and having our employees that have restrictions

from an injury getting back to work as soon as possible.

The management group does know if someone has a question about an off the job type of injury, or someone has restrictions where they are not able to do their job, they usually contact myself or will contact Carol Martin.

If they contact me, I refer them to Carol. And Carol will ask them a series of questions and get to the bottom of what's going on and decide what course of action to take from there.

Q. And what is the course of action that UPS takes with a person who was injured off the job?

A. Again, that falls to Carol. And again, each injury is going to be different, depending on [41] what the type of injury it is and depending on what the type of restrictions are in the person.

But if a person is hurt off the job, they are not able to work until they are able to return to work regular duty.

Q. And what about for the employee with a medical condition that's not related to on the job, such as diabetes or high blood pressure, what training is given to management related to those persons?

A. Again, management training is given to the extent that they understand that a person needs to be able to do their regular job with no restrictions. If a person comes across any type of restriction, they are

referred to Carol. And Carol at that point directs the person on what they need to do.

Q. This is Carol Martin?

A. Yes, ma'am.

Q. And what is her title?

A. Occupational Health Manager, was Occupational Health Manager. She retired on

* * *

[45] Q. What training is given to management with regard to the employee who has an off the job originated medical condition, such as diabetes or high blood pressure?

A. Again, that's specific to each case by case basis. And Carol Martin is the one that gets that training. Management knows if someone has any kind of restrictions where they are not able to do their regular job they need to contact myself or Carol. And at that point Carol directs the questioning and determines what needs to be done at that point.

Q. You said that management knows if somebody has any kind of restriction to contact myself or Carol. What happens if they contact you?

A. I direct the person to Carol.

Q. All right. And once the person is directed to Carol Martin, what does UPS do?

A. Again, what Carol does I am not aware. I mean, again, it's a case by case basis. It depends on what the situation is and what course

* * *

[61] MS. GUSTAFSON: You're testifying, and I'm not asking you to testify.

MR. MCGEE: The point is, asked and answered. You are completely mischaracterizing his testimony.

THE WITNESS: Again, it's a case by case basis that's dealt with the Region, Corporate Office, and the District.

BY MS. GUSTAFSON:

Q. Are there no policies or criteria that UPS has in place to decide which case will be treated in what manner?

A. I am not aware of what those are, if there are any.

Q. And now we're talking about the person with some physical condition, other than an on the job injury?

A. Correct.

Q. All right.

MR. MCGEE: Ms. Gustafson, and you're specifically talking about a disqualified driver, correct?

* * *

[74] job.

Q. I'm talking now about the person – not the person who has an injury who is trying to build up, but the person who has something such as diabetes, or vision problems, or sleep apnea, that person who temporarily cannot do their driving job.

A. Again, they are not working TAW. They would be in the preload working in a job that they needed them to work on the preload.

Q. How does that differ from TAW?

A. TAW is a person that has restrictions that's not able to do their normal job. For instance, a driver has a 20 pound weight restriction. A driver handles more than 20 pounds every day, so they are not able to do a driver's job.

If a doctor gives them a 20 pound weight restriction, we ask them to come inside, work an inside operation in the parameters of their restrictions.

And we limit it to 30 days. Again, for [75] the work hardening, we want them to get back to be able to do their regular job. Anything over 30 days – 30 days, with a target of return to work date. We need to know when they are going to be back to their job regular duty.

Q. And now you're talking about the person with the on the job injury, am I correct?

A. Correct.

Q. So the person with the on the job injury is given temporary alternate work, so if they have a weight restriction they are given some temporary alternate job to get them back to their regular job?

A. Correct.

Q. Now, I understand that I believe. And when they are given this temporary alternate work, for the driver who is given temporary alternate work, he was driving a truck outside of the plant?

A. Correct.

Q. But now he is inside the plant doing some job inside the plant?

A. Correct.

[76] Q. Now, switching gears to the employee who has not an on the job injury, but who has a physical condition, such as diabetes or high blood pressure, that makes him temporarily unable to drive.

When that person is given an inside job, how does the inside job that that person is given differ from the temporary alternate work that the person with the on the job injury has?

A. The person with temporary alternate work needs to be able to work within their restrictions. The person with diabetes that comes and works inside

needs to be able to do any job inside. He doesn't have restrictions on what job he can you.

Q. Well, he is restricted in that he can't drive?

A. Correct. But in the inside operation he can do any job. There is no weight restrictions or anything limiting him from doing any of those preload jobs.

Q. But the person who comes to do the inside [77] job because of his diabetes or his high blood pressure may be doing the same jobs that the person who is on temporary alternate work, isn't that correct?

A. Correct. Or any of the other jobs as well.

Q. But the person who has high blood pressure or diabetes and cannot drive for those reasons, they don't have this 30 day restriction that the person who has an on the job injury has in terms of the period of time for which they can do the inside work?

A. Okay. It's not a 30 day restriction, it's a 30 day guideline. Because we do have people that we review, when we get closer to 30 days, to extend that TAW.

Q. How long can it be extended?

A. That's a decision with the district. Again, between the HR Manager and the Health and Safety Manager. You know, if we need to push it on another week or two because the person's doctor says they will be back regular duty, we have done [78] that.

The person with diabetes that comes and works inside, there is no time limit on that. It's a decision that's worked through Occupational Health and their doctor to determine when that person is going to be back.

Q. When you say it's between Occupational Health and their doctor, who is the person in Occupational Health?

A. Carol Martin.

Q. Does Carol Martin speak to their doctor about how long they need this other inside work, or what?

A. Carol Martin reviews with their doctor, reviews again with the Region and the Corporate Office to make sure they are following the correct guidelines, make sure this person is not being put behind the wheel without having and passing a DOT physical.

Q. Who in Corporate does Carol Martin review that with?

A. I don't know.

[79] Q. Is there anything in writing, other than the collective bargaining agreement, that explains the company's policy with regard to these inside jobs for people with physical conditions, such as high blood pressure, diabetes, that makes them temporarily unable to drive?

A. The collective bargaining agreement is the document that we use. Carol Martin follows the same guidelines.

Q. Is there anything, other than the collective bargaining agreement, in writing about it?

A. There is a diabetes protocol, and that's also referred to by Carol.

Q. How big a document is that?

A. I don't remember. Three, four, five pages long. I mean, it's not a lengthy document. It's part of one of our manuals.

Q. What manual is it part of?

A. We call it the orange book. The Respiratory Protection Program I believe is the manual that that's in.

* * *

[93] District?

A. He is the Human Resources Division Manager in charge of Human Resources for the District. Frankie McDonald, she is a manager – is the Employee Relations Manager that reports to Frank Becker. But she is the Employee Relations Manager for the District.

Q. So as far as you know, UPS does not have any written policies, other than what you have just named, that relate to the employee who for

non-injury physical reasons is temporarily unable to do his or her regular job, is that correct?

A. Correct.

Q. What is the specific business reasons or purposes for the policy that permits the employee with a non-injury physical condition, such as diabetes or high blood, what is the reason that they are permitted to do these inside jobs?

A. It's under the collective bargaining agreement that they are able to come inside and work until they are able to re-obtain their license and be able to go back out on the road.

[94] Q. And what is the reason that the collective bargaining agreement provides for the employee with a condition such as diabetes or hypertension to be able to come inside and work when they can't drive?

A. Again, you're asking me to tell you why they put that into the contract. It's a smart business decision. It's instead of telling somebody they can't work, or they are out of a job, –

Q. Why is that?

A. And again, I am guessing of what that person wrote into the contract. I didn't write that contract, so I can't tell you.

Q. Why is that a smart business decision to let that person work rather than say they can't work?

A. It's a smart business decision because instead of letting a person not work here anymore, you are still keeping him employed. I mean, again, that's my guess.

MR. MCGEE: She is not asking you to

* * *

[102] clarify what situation you are talking about.

BY MS. GUSTAFSON:

Q. Mr. Brien, in order for a UPS driver to drive there are multiple things that the driver must be able to do in order to have that job, isn't that right?

A. Correct.

Q. Okay. I am talking about the driver who for any reason is not able to drive because he or she cannot do something on that list of things that a driver must be able to do in order to drive.

So backing up again, I'm going to go back to the same question. Isn't UPS's policy that the pregnant woman who is temporarily unable to do her regular job is not permitted to do temporary alternate work, or inside work, or light duty?

A. Again, like I said before, whether it's a pregnant woman, someone that has restrictions where they have been injured off the job, anybody that can't do all aspects of their job that was not related to an on the job injury is not [103] permitted to work temporary alternate work. It's not in the

contract. It's not covered under ADA. It's not covered in either of those.

Q. You have already testified today that there are employees, drivers, who for reasons related to high blood pressure, or diabetes, or sleep apnea, or physical conditions of that nature, are temporarily unable to perform some aspect of their job and they are given inside work, isn't that correct?

A. No, that's not correct.

Q. What is not correct about it?

A. They were not able to do their driving portion of their job and –

Q. Isn't the driving portion –

MR. MCGEE: Ms. Gustafson, you are cutting off the witness again.

BY MS. GUSTAFSON:

Q. Go ahead, answer. I didn't mean to cut you off at all.

A. They were not able to do the driving portion of the job, and they are moved to the [104] inside operation and expected to be able to do any job within that inside operation.

Q. So the driver – when you say they are not able to do the driving portion of the job, drivers, that is their job, they drive, right?

A. They drive, they lift packages, they move handcarts, they do a lot more than just drive. Sleep apnea, diabetes, high blood pressure are all things that allow them not to be able to obtain the DOT card. And without having a DOT card they are not allowed to drive one of our vehicles.

Q. So because of the sleep apnea, or the high blood pressure, or the diabetes, they are unable to do their regular job, isn't that correct?

A. They are unable to do the driving portion of their job, if that's what you are talking about. Again, as far as diabetes, they might not be able to do any part of their job whatsoever.

Q. But those persons, the person who has diabetes, or hypertension, or sleep apnea, some of them, because of those physical conditions, are [105] not able to do their regular job and they are given inside work, isn't that correct?

A. They are not able to do the driving portion of their job, and then they would be offered inside work.

Q. Okay. Isn't it correct that it's the company policy that if it is a pregnant woman who is unable to do some portion of her job such that she cannot drive, she is not permitted to do inside work?

A. You have got to be more clear about that. Anybody that has any kind of condition where they are not able to do their job, if it was not related to work, they will not work TAW.

That is an off the job type of injury or illness and would fall back to Carol to go under the guidelines of the collective bargaining agreement or the Americans With Disabilities Act.

Q. I am comparing the person who is unable to do their regular driving job because of hypertension, or diabetes, or sleep apnea, to the person who is temporarily not able to do the

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[109] am not going to make a general statement about every case is treated exactly the same, because they are not. It's a case by case basis.

Q. I don't know anybody's names. I have not been permitted to learn the names of people in discovery. So I don't know employees' names, I cannot tell you employees' names.

What I am asking you is – this is a simple question. And if there are exceptions, I would like you to tell me what they are. Isn't it true that the employee, the UPS driver, who is temporarily unable to do some portion of his driving job because of reasons related to high blood pressure, diabetes, sleep apnea, and things of that nature, that person is permitted to do inside work, isn't that true?

MR. MCGEE: Objection, asked and answered.

BY MS. GUSTAFSON:

Q. First state whether it's generally true or not, and then I'll ask about exceptions.

A. Again, I'm not going to answer generally. [110] I'm saying if a person has high blood pressure, diabetes, sleep apnea, has spoken with Carol Martin, and they determine that that falls under the guidelines that they are not able to drive but they are able to do the rest of the portions of their job, that they are offered inside work to work inside, to do a regular job inside without restrictions.

Q. A driver's job, what are the portions of his job other than driving?

A. He does numerous things. He walks to and from the package car to make deliveries, he lifts packages, he loads packages, he loads handcarts, he opens the bulkhead door, closes the bulkhead door.

He opens the back door, he closes the back door. He picks up packages from customers and brings them back to the package car. He fills out paperwork throughout the day, he keys into the Diad board throughout the day, which is our electronic clip-board.

He communicates with customers. They

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[114] BY MS. GUSTAFSON:

Q. So for the driver, the UPS driver, who has hypertension, or high blood pressure, diabetes, or

sleep apnea, and physical conditions of that nature, if the collective bargaining agreement says that that person gets other inside work, or temporary alternate work, or whatever it says, then they get it, is that correct?

A. They would not get temporary alternate work. They would work inside doing a regular job inside that a normal inside employee would do.

Q. That would be temporary, wouldn't it?

A. No, that's not temporary.

Q. It's permanently, they permanently get to do that?

A. That is not temporary alternate work. Temporary alternate work is very different. It's like the light duty that you were talking about before. Temporary alternate work is a short term, less than a regular job, that fits within a person's restrictions.

A driver that is taken off the road [115] that's not able to drive, does not have any type of lifting restrictions, or any other restrictions, except that they can't drive.

Q. You don't mean that they physically couldn't turn the key and press on the gas? You mean they are not permitted to drive, isn't that right?

A. They are not permitted to drive because they can't pass their DOT physical for whatever the reason may be, sleep apnea, high blood pressure, diabetes, and so forth.

Q. So it is the company's policy that the person who temporarily cannot drive for those reasons gets this inside work, is that correct?

A. Receive an inside job.

Q. And it is also UPS's policy that the person who is pregnant and has a lifting restriction related to the pregnancy does not get the inside work, is that correct?

A. Again, you are talking about a specific person that's pregnant. Again, it's a case by case basis. But if we had an employee that had [116] lifting restrictions and was not able to do their regular job due to something outside of an on the job injury, they would not be offered temporary alternate work.

Q. Why is that?

A. Again, we are following the collective bargaining agreement, as well as ADA, and making sure that we are following our policies and non-discrimination policies, that we are following within those guidelines, and doing what we are supposed to do. There is nothing in the collective bargaining agreement to that effect.

Q. So as I understand, and you correct me if I'm wrong, the reason that the person with high blood pressure, diabetes, sleep apnea, or physical conditions of that sort, gets inside work is that the collective bargaining agreement calls for it, and that's the only reason, is that correct?

A. That's not the only reason. The collective bargaining agreement, as well as the law that we treat everybody fairly. I mean, non-discrimination policies fall within that as [117] well.

Q. What law are you referring to?

A. I said the non-discrimination policies. We are following within the law, making sure that we are doing what we are supposed to do.

Q. What non-discrimination policies require you, UPS, to give the person with hypertension, or diabetes, or sleep apnea, inside work?

A. I'm not saying that. I'm saying that we treat everybody the same, that we don't discriminate. And we follow the policies, and that's one of the policies that we follow.

Q. So your answer is yes, that it is only the collective bargaining agreement that permits that person to get inside work, is that correct?

A. I'm saying we follow all the laws and guidelines the way we are supposed to.

Q. Is there anything other than the collective bargaining agreement? Is there any other reason, other than the collective bargaining agreement, that UPS permits the driver with hypertension, or diabetes, or sleep apnea, or [118] other similar physical conditions, to do inside work when that person temporarily cannot perform his or her driving job?

A. The collective bargaining agreement is the only place that that's written. And again, as long as the driving portion of the job is the reason that they are not able to get their DOT card to be a driver.

Q. What do you mean as long as the driving portion of the job is the case?

A. To have to be – if they are not able to get their DOT card, they are not able to drive, they would be placed in an inside job. They have to be able to do every other aspect of their job.

Q. But in order to drive a driver has to be able to lift packages up to 70 pounds, isn't that correct?

A. Correct.

Q. So why is the employee who can't lift packages up to 70 pounds for some physical reason treated differently than the employee who has hypertension?

[126] BY MS. GUSTAFSON:

Q. Yes. What are the specific and concrete benefits to the company of its light duty and alternate work policy, and I'm being more specific, for the employee who has high blood pressure, or sleep apnea, or some condition like that, what is the benefit to the company of permitting that person to do an inside job when they can't drive?

A. And again, you are referring to temporary alternate work. And again, that's not temporary [127] alternate work. They are doing a normal inside job. Again, it's the benefit to the company to keep the

employee that has a lot of knowledge of the area or route that they normally would deliver.

And it's very expensive to hire new employees. I mean, I think that pretty much s it up.

Q. Why is it expensive to hire new employees?

A. A lot of training time involved. A new driver has to go through a week's worth of training. The Supervisor has to be on-call with them numerous days in order to teach them the route.

They have to learn the electronic clip-board, they have to learn the delivery area, they have to learn the area where they are going, They have to know how to properly handle packages, how to properly drive. So there is an awful lot that goes into the job. A lot of training time involved.

[128] Q. And wouldn't the same benefits be true if the company permitted the woman who temporarily cannot drive for reasons related to her pregnancy to do inside work?

A. Again, I can't answer that question.

Q. Why is that?

A. Because I don't make that decision. And it's not in our collective bargaining agreement, and not through ADA, falls under those guidelines.

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[133] Q. What about the weight of the packages, does the air driver tend to deliver lighter weight packages?

A. They could be any weight. You never really know what the weight is. Again, it's whatever the shipper is shipping or whatever we are picking up.

Q. I'm talking about generally. Are they generally lighter packages?

Mr. MCGEE: Objection, asked and answered

BY MS. GUSTAFSON:

Q. Do you believe that the average weight is any different from one than the other?

A. No.

Q. So the only difference between the air driver position and the full-time driver position is the number of hours they are on the job, the number of packages that they deliver, is that correct?

A. No, there is a lot of differences.

Q. What are the other differences?

MR. MCGEE: Objection. Ms. Gustafson, if

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[170] MR. MCGEE: Ms. Gustafson, if you just would let him finish before you jump in. I just ask that as a courtesy.

THE WITNESS: UPS follows the guidelines of non-discrimination. As far as pregnant women, they would be handled the same as anybody else. If a pregnant woman has no restrictions to be able to do their job, they would be able to continue to do their job.

Again, we don't know every woman that is pregnant. Again, they don't have to disclose to us whether they are pregnant or not.

BY MS. GUSTAFSON:

Q. Of course that's true. But when they do disclose to you that they are pregnant, and they have some pregnancy related restriction, has UPS ever granted them any sort of accommodation?

A. What would the pregnancy related restriction be?

Q. An example would be a lifting restriction.

A. Again, I'll just go back, we don't [171] discriminate against pregnant women, and we treat pregnant women the way we would do anybody else. As far as has a pregnant woman with restrictions received – I'm sure you're asking about a TAW position. No, they have not, to my knowledge.

Q. I'm not asking about TAW. I am asking about any accommodation, light duty, has a pregnant woman ever been given light duty?

A. Are we talking about a union job or a non-union job?

Q. Either. Start with either.

A. I don't know.

Q. Okay. Has a pregnant woman ever been given an inside job related to some physical condition related to the pregnancy?

A. Are you talking about a driver that's not able to drive now or –

Q. First we will start with anybody.

MR. MCGEE: What do you mean given an inside job? Do you mean given an inside job different from their current job, Ms. Gustafson?

MS. GUSTAFSON: I am asking the

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[186] requirements?

A. I reviewed the different jobs with the essential job functions and the bargaining unit jobs.

Q. Where did you review these?

A. I review them all the time. I mean, that's part of my job.

Q. There aren't some people who handle just smalls and they don't have to lift up to 70 pounds?

A. Again, like I told you, like the preload job, when people are hired onto the preload they are not hired into a specific job, they are hired to that preload operation.

So those people have to be able to do any type of job that would occur on that preload. So any job there would have – you know, everybody that would work on that operation would have to meet those guidelines and be able to lift up to 70 pounds.

Q. What about for employees who never have to lift more than 70 pounds in their jobs?

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BY MS. GUSTAFSON:

Q. So your testimony is there are certain employees who never have to lift over 20 pounds, but that the job still requires 70 pounds because they might possibly be moved to another position where they would have to lift over 20 pounds?

MR. MCGEE: Objection. Complete mischaracterization of the testimony.

BY MS. GUSTAFSON:

Q. Correct me. Go ahead.

A. Certain parts of a job that might not require that person to lift over 20 pounds.

Q. Certain what?

A. There are certain parts of a person's job that might not require them to lift over 70 pounds. But –

Q. I'm talking about 20 pounds.

A. Over 20 pounds?

Q. Yes.

A. For instance, you could have a person in the sort aisle that moves packages, that doesn't lift anything, but when they are short in the [189] unload and they need somebody in unload, that person is going to have to move to the unload and move packages that are over 70 pounds, or over 20 pounds, excuse me.

Q. But isn't it true that there are, in fact, some employees who never get moved to positions where they have to lift over 20 pounds?

A. Not to my knowledge. Most of the employees are moved around quite a bit.

Q. Most of them are moved around quite a bit, but not all of them are, isn't that right?

A. I would say all of the employees at some point are moved somewhere else. That they need to have that availability to be able to fill other positions as needed.

Q. I understand that UPS's policy is to require them all to be able to be moved into other positions where they have to lift over 20 pounds. But as a matter of fact, some of the employees do just stay in jobs where they don't lift over 20 pounds, isn't that correct?

A. You don't understand what I'm saying. [190] And I'll give you a perfect example. In our preloading in the D.C. building all the sorters, when the air

trailer comes in, have to go up to the air trailer and unload the air trailer.

So employees are constantly moved around into different positions. That's why when people are hired we review the essential job functions with them and let them know they need to be able to lift up to 70 pounds.

Because there is no guarantee they're going to be stuck in one spot and that's the only place they would be working.

Q. I understand that there is no guarantee. I'm not asking about whether there are any guarantees, there are none. You have stated it, I accept it, there are no guarantees. That's a different question.

My question isn't whether or not there are guarantees about whether people will not have to lift over 20 pounds. My question is isn't it true, whatever the guarantees are or are not, isn't it true that there are some employees whose

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[194] quite a bit.

BY MS. GUSTAFSON:

Q. Any other reasons?

A. No.

Q. Okay. Does the company require doctor's certifications that employees can lift any certain weight?

A. When they start employment?

Q. At any point. But we can start with when they start employment.

A. When they start employment, no. Again, we review the essential functions with the employee and tell them what the expectations are.

Q. Does the company at any point require a doctor's certification that an employee can lift up to 70 pounds?

A. We require a doctor's certification when an employee is injured. The certification needs to say that the employee is able to return back to work with no restrictions to their regular job.

Q. Are there any other times when UPS requires a doctor's certification that an employee [195] can lift a certain weight?

A. If its brought to our attention, or someone brings to our attention, that they are not able to perform their job, we would ask them to supply us with a doctor's note to tell us what their restrictions are.

Q. Did you consult anything in writing for that?

A. No.

Q. So your testimony is that anytime that an employee brings to UPS's attention that they have a weight restriction –

A. That they are not able to perform their regular duties.

Q. Then what happens?

A. Whether it be on the job or off the job type of injury, they would have to supply us with a doctor's note so we make sure that we are following the guidelines of the doctor's restrictions and doing what the doctor wants us to do.

Q. Isn't Carol Martin the one who decides

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[213] BY MS. GUSTAFSON:

Q. What is the broad range of jobs, and I'm limiting this to jobs that Ms. Young because of her experience and education would be capable of doing, what's the broad range of jobs that UPS believes that Ms. Young remained able to perform during her pregnancy?

A. Again, Ms. Young was under the collective bargaining agreement. So she would have to be able to meet the requirements of whatever job her restrictions allowed her to be. So again, most of those jobs require – have weight limitations, so she wouldn't be able to do any of them that I'm aware of.

Q. What are the specific and concrete reasons that Ms. Young was coded as being disabled or out on disability at any point during her leave from October '06 to April of '07?

A. Do you mind if I go back to my notes?

Q. I don't, just as long as you give me a copy once you have referred to them.

A. Okay. In review of these questions I [214] talked to Carol Martin, who did follow up on finding out why this person would have been coded Code 18, and they couldn't find out who was the person that did that.

And it doesn't necessarily mean when we code somebody an 18 that they are on approved disability. It just says that they are not working because of an off the job situation, that they are not able to be at work.

Q. Well, many people who were not working because of an off the job situation are coded as being out on FMLA, are they not?

A. FMLA, they would have to go through, again, with Carol, and fall under the guidelines of FMLA. The only time FMLA should be used is, again, if it was an approved FMLA.

Q. Who did Carol Martin talk to to find out who coded Peggy Young as disabled or out on disability?

A. I know she followed up with the center and the Center Manager, Steve Duca.

Q. Who did she talk to at the center, other

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[224] during that period?

A. I don't know what her situation was at that time, so I couldn't tell you what she should have been coded. I don't know if she was sick, or disability, or what the situation was at that time.

Q. When you spoke to Carol Martin about this, about how she was coded, did you have the impression or did Ms. Martin say anything about whether she was coded rightly or wrongly?

A. I know she had, you know – she felt the same way most people do, that that's just a coding that they use when a person is not at work, not that she was disabled in any way.

Q. So it's your testimony that that's the coding they use every time a person is not at work?

A. That's the coding they use most of the time – for example, if you have someone, like I said earlier, that's playing basketball and hurt their back and it's not at work, they would use the disability code that basically said they are [225] just not at work, instead of, you know, sick, or called out, or something along those lines.

Q. Is there any written policy about which codes are supposed to be used when?

A. It's on the Pittsburgh, the different codes are listed on the Pittsburgh on what they are supposed to use in the legends –

Q. I have seen that.

A. – to put in the books for each day.

Q. But other than what appears on the face of the Pittsburgh, is there any other written instruction to anybody anywhere about how those are to be filled out?

A. No, just other than the management group reviewing with whoever is doing it how to do it.

Q. When you say the management group reviewing it, does that happen on a certain basis, time basis, or when would management review that?

A. They would review it when a person is new. I mean, basically, someone starting the job and had never done that before and are not familiar with the form, how to fill it out, and

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[240] building itself?

Q. Right.

A. Yes, that's under the same – they are in the same Teamsters.

Q. So they have the same situation the D.C. building does as to whether or not the customer counter positions are part of the bargaining unit?

A. The Landover building does not have a customer counter. If anybody needs to come pick up a package, they go to the D.C. building. So all the Landover packages are brought over to the D.C. building.

Q. I understand now, I believe, thank you, about the customer counter positions in the D.C. building. And I understand a lot from your prior testimony today about the bargaining unit and management.

You have talked – and I know outside of the building you've got Division Managers. And Myron Williams was a Division Manager, which means he was over more than the D.C. building, is that right?

[241] A. I'm trying to think back at that time. I believe he only had the D.C. building. At one point the D.C. building and Waldorf were combined at one point, and the D.C. building and Landover were combined. But I believe at the time he was there he only had the D.C.

Q. And he was the – I get confused between division and district. But he was the Division Manager?

A. He was the Division Manager. So basically he is in charge of that building and everybody that works there.

Q. But the words district and division are not synonymous?

A. No.

Q. But it was the Metro – because Metro D.C. District included other buildings?

A. The Metro D.C. District includes a lot of buildings, yes.

Q. So district is bigger than division?

A. Yes. Now, he also had the air counters downtown, the L Street and K Street air counters.

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[250] full-time.

Q. Okay. So how many package car drivers are there?

A. Again, I just told you five centers, 70 to 75 employees per center.

Q. So there are 70 to 75 package car drivers per center?

A. Correct.

Q. All of which are full-time?

A. Correct.

Q. And then in addition to those full-time package car drivers you have – everybody else is part-time, is that right, in the bargaining unit?

A. No.

Q. Who else is full-time?

A. You have the combo positions, which are considered full-time.

Q. How many of those are there, approximately?

A. I have no idea.

Q. And they do two part-time jobs that make a full-time job?

[251] A. Correct. They either call them inside-inside or inside on road, where you work two inside jobs or you work inside and do a delivery job as well, or air job, air driver job.

Q. All right. So those people are full-time. And then the rest of the people in the bargaining unit are all part-time, is that correct?

A. Correct.

Q. And that consists of approximately 150 employees on the preload, and approximately 50 to 70 employees on the local sort?

A. Correct.

Q. Okay. And the whole word combo means you are combining two part-time jobs to make it a full-time job?

A. That was through the contract negotiations we were told that we needed to put so many new full-time positions together, and that's how they did it. They were able to combine two part-time jobs to form a full-time job.

MS. GUSTAFSON: I need a two or three

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[254] approximate, 70 to 75 package car drivers each?

A. Correct.

Q. We have the combo air drivers inside-inside or inside-outside that combine two part-time positions to make a full-time position?

A. Correct.

MR. MCGEE: You said we have the part-time air drivers combo, and then you said inside-inside. Well, if they are a part-time air driver they are not an inside-inside, right?

THE WITNESS: Correct.

BY MS. GUSTAFSON:

Q. They are combo drivers –

A. But you have combo air drivers. If they are inside-inside they would not be an air driver.

Q. All right. They are coming off of there, deleted. We have the combo air drivers which have inside-outside jobs?

A. Correct.

Q. In addition to that, we have other combo employees who are not drivers who do inside-inside jobs?

[255] A. Correct. And again, on both of those I'm not aware in the D.C. building if either one of those jobs exist, but they do exist in the District.

Q. So the combo employees do an inside job part of the time and an outside driver job part of the time?

A. No. The combo employees do inside work and inside work, so like a local sort and a carwash.

Q. So we have the inside-outside, and those are the combo air drivers?

A. That's someone that does inside work and goes on the road and delivers air.

Q. Okay. But the combo employees inside are all inside-inside?

A. Right. They do two different jobs inside, like a local sort and a carwash.

Q. Thank you. Those are all of the full-time bargaining unit employees in the D.C. building, is that correct?

A. Yes.

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[397] Q. How do you know that she consulted guidelines?

A. Because like I said before, I have worked with Carol for an awful long time, she is very proficient at what she does, she is very knowledgeable about what she does.

She does a lot of reading. She has taken all kinds of classes. And when reviewing subjects with her, she has a very good depth of knowledge.

Q. Is there any other reason that you think there are some guidelines that she consults?

A. No.

Q. Who replaced Carol Martin?

A. There is no one in place right now. Her district counterpart of Metro Philadelphia is currently covering for her.

Q. And you said she retired on Friday I think?

A. This past Friday, yes.

Q. From October 1, 2006 through November 30, 2006 Myron Williams held the position of what?

A. Capital Division Manager.

[398] Q. And in this position he was the manager over at the D.C. building and the L Street and K Street counters, is that not right?

A. Correct.

Q. And what was the nature of his job? What were the tasks that he performed and the responsibilities that were assigned to him?

A. His responsibilities were all the delivery centers within that facility, as well as the preload and the local sort operation.

Q. So everybody in the D.C. building and the L Street and K Street counters reported up to him, is that right?

A. He was the ultimate head person for the Capital Division, yes.

Q. Did he have the ability to hire and fire employees in that division?

A. Yes.

Q. Did he have authority to grant leaves of absence?

A. He wouldn't have authority to grant leave of absence. It would have to, again, be reviewed [399] with either Carol Martin, James Lott, or Frankie McDonald.

Q. Was there some written description of the Division Manager position that set these things out?

A. I'm not aware of job responsibilities for Division Manager. I would guess that there are responsibilities written somewhere to give the Division Manager guidelines on helping them best perform their job.

Q. You say you would assume that there are some things, but you are not aware of them, is that right?

A. Correct.

Q. Why would you assume that there are such things?

A. The company wants to make sure that we are taking care of items that need to be taken care of. And I would think that it would put some guidelines to try to help the Division Managers better do their job.

Q. How do you know that the Division Manager

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[403] basis. They would talk about how their staffing was, areas of concern, if they had employees that were of concerns what were they doing, if they had people that weren't coming to work, you know, what are we doing to get a hold of them to get them back into work.

So that was an interaction with Human Resources as far as staffing needs. And if people were terminated, there had to be an explanation on why, and Human Resources would do a follow-up on why somebody had left.

Q. And again, you know this not because you have read it, but because you have experienced it in your job, correct?

A. Correct.

Q. What would a Division Manager like Myron Williams do if he had somebody not showing up to work? I mean, you said there would be these weekly staff meetings. Who would attend those meetings?

A. It would be the Center Managers, the Human Resources Representative from the division, [404] and on occasion the Workforce Planning Manager from the district would attend.

Q. The supervisors did not attend those?

A. Supervisors usually did not attend those, unless they were covering for the Center Manager that was not there for whatever reason.

Q. And at those weekly meetings where these things were discussed, did you ever attend a weekly meeting like that?

A. Yes, I did.

Q. And if an employee was not coming to work for some reason, what would the Division Manager do about that?

A. Usually they would drill down on – and a lot of times this was with the part-time operations, if they had people that weren't coming to work – turnover is very important, that we try to make sure that everybody is at work every day and not calling in and so forth.

If we had a person not coming to work and wasn't showing up, you know, what have we done to try to contact them to find out what the issue is [405] and what's going on.

If they had people that left, they would talk about why did they leave, you know, if it was for school, or they found a full-time job, or whatever the case would be.

So discussions on turnover, what the needs were moving forward. We would look at holidays where you would have some additional needs, we would have to put some additional people on.

There is a big planning period moving forward into Christmas, because of the number of additional people you need to put on, and all the helpers we need to put on during that period.

Q. But generally the Division Manager was interested in reducing turnover to the extent possible, is that right?

A. The Division Manager was interested in – again, if somebody leaves the company, and then it's more training and so forth, so they are interested in making sure that everybody is at work every day.

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[478] information that had been gathered by a variety of people within the company relating to these various subject matters?

A. Yes, I did.

Q. And did those documents include information such as the employee history profiles, medical documents, TAW registers?

A. Yes.

Q. And did you also review additional and other documents?

A. Yes, I did.

Q. And some of those included, you know, pay records for Ms. Young, delivery records for Ms. Young?

A. Yes.

Q. And did you also in preparation for the deposition review additional documents above and beyond those things?

A. Yes, I did.

Q. With respect to the provision in the collective bargaining agreement that requires the company to provide temporary alternative work for [479] employees who have on the job injuries, does getting those employees back to work earlier help reduce the company's workers compensation liability?

A. Yes, it does.

Q. Is that a benefit to the company, reducing workers compensation liability and exposure?

A. Yes, it is.

Q. If a pregnant employee was a driver, a pregnant driver, was disqualified from driving and not able to receive her DOT certificate because of her pregnancy condition, but was able to do inside work, would that employee be entitled to an inside job under the collective bargaining agreement governing disqualified drivers?

A. Again, that would go through Carol Martin. And that would be handled the same as those other cases we spoke of, and that person would be offered an inside job until they were able to go back and fix their DOT physical or whatever problem it was to be able to go back [480] driving.

Q. And under the provision of the collective bargaining agreement is it true that it only applies if the following two conditions exist, and one is that the individual is disqualified from performing the drive related functions, but two, is nonetheless able to perform an inside job?

A. Correct.

Q. And is an employee who has a 20 pound maximum lifting restriction qualified and able to perform an inside job?

A. No.

Q. If you had a male driver who incurred an off the job injury, such as playing basketball on the weekend, which resulted in a 20 pound lifting restriction, but was able to perform driving related functions, able to drive, would that male employee be entitled to an inside job under the provision of the collective bargaining agreement dealing with drivers who are disqualified from driving and not able to get their DOT certificates?

[481] A. No. Because if they had a lifting restriction they wouldn't be able to do that job inside.

Q. And if the same male employee who had an on the job injury that resulted in a lifting restriction, an off the job injury, would that individual be entitled to temporary alternative work under the collective bargaining agreement?

A. No, they wouldn't.

Q. And is that the case regardless of whether it was a male or a female employee?

A. Correct.

Q. Does UPS's employment opportunity or non-discrimination policy prohibit discrimination on the basis of sex, not just sexual harassment, but any discrimination based on sex?

A. Yes.

Q. Is an employee who is DOT certified and able to drive, but has a lifting restriction that prevents the individual from lifting packages, entitled to inside work under that provision of the collective bargaining agreement that provides [482] inside work for disqualified drivers?

A. Again, are we talking about an employee that's had an off the job injury that's giving them weight restrictions?

Q. I am talking about the provision of the collective bargaining agreement that provides inside work for disqualified drivers who cannot drive but can do inside work.

Does an individual who has a lifting restriction that prevents them from lifting packages, but does not prevent them from driving, are they entitled to any type of inside work under that provision of the collective bargaining agreement?

A. Only under TAW, on an on the job injury.

Q. And that's a different provision of the collective bargaining agreement dealing with TAW?

A. Correct.

Q. Are pregnant employees allowed to continue working for as long as they want if they are able to perform the essential functions of their job?

[483] A. Yes.

Q. Do all bargaining unit employees have access to the collective bargaining agreement through their union representatives?

A. Yes, they do.

Q. Do all bargaining unit employees have access to the company's Family Medical Leave Act policies?

A. Yes, they do.

Q. Did Carol Martin inform you that she did not regard Peggy Young as having any restrictions other than the lifting restrictions that her doctor imposed?

A. Yes.

Q. Did Carol Martin inform you that she regarded Peggy Young as being able to do a broad range of jobs, any job that did not require lifting over 20 pounds?

A. Yes.

MS. GUSTAFSON: I object to this, just for the record. Because Mr. McGee would not permit Carol Martin to answer any questions about

* * *

[490] Q. And where it says L-O-A, P-T-D, do you know what that indicates?

A. I'm not positive what that would be.

Q. You described the company's policy pursuant to which employees who have a lifting restriction and aren't able to do their job because of an off the job injury are not entitled to light duty or temporary alternative work?

A. Correct.

Q. Does any supervisor or manager have authority to grant somebody light duty or alternative work in violation or contrary to the company's policy?

A. No, they are not.

Q. Who does the hiring for particular buildings, and let's be specific, who does the hiring for the D.C. Building?

A. Wendy Russell currently does the hiring.

Q. But what function does that person have? What's their title?

A. Human Resources Representative.

Q. So the Human Resources Representative

* * *

[506] Q. You testified today on cross-examination that an employee with a 20 pound lifting restriction is not qualified for an inside job, do you remember that?

A. We have been talking about 20 pound weight restriction so on and off, I'm sorry.

Q. That's okay. Earlier today though you gave an example of somebody with a lifting restriction who was given some kind of inside job, did you not, when you were going through those employees?

A. I'm not familiar with what you are talking about.

Q. So is it your testimony that no employee with a lifting restriction is ever given any kind of inside job?

A. If a person has an on the job injury and have restrictions, a lifting restriction of 20 pounds, yes, we could give them – we try to fall within those guidelines of those lifting restrictions, again, if they had a targeted return to work date.

[507] Q. Okay. What sort of inside job would you give them if they had this on the job injury that resulted in a 20 pound lifting restriction?

A. They could do a number of different jobs.

Q. What sort of jobs?

A. They could be a scanner, they could do some of the carwash positions, they could sort packages in

certain locations, they could pick up packages in certain locations.

I mean, anything that would – any job there that they could do that would fall within those restrictions.

Q. What other jobs are there?

A. There is numerous types of jobs. They could work on the local sort, they could work in keying packages into a computer, they could – I mean, off the top of my head those are positions I can think of.

Q. The scanner, the carwash, sorting packages, picking up packages, local sort, and keying packages into the computer. Anything else you can think of?

[508] A. Not off the top of my head, no.

Q. Does UPS treat the woman who is physically affected by pregnancy the same way as an employee who is physically affected by some other condition but similarly unable to do their job for a while?

A. Again, each case is handled on a case by case basis. You might have someone whose condition is completely different than another person, so those two people aren't going to be treated exactly the same.

They would follow the same guidelines, they would talk with Carol Martin, and then Carol would determine what course of action would go from there.

A. You testified on cross examination that Carol Martin said she regarded Peggy Young as being able to do a broad range of other jobs. When did Carol Martin say this to you?

A. When we were reviewing the questions and the different employees on the deposition.

Q. Was that within the last couple of weeks?

NITED STATES DISTRICT COURT
FOR THE DISTRICT OF
MARYLAND

PEGGY YOUNG, Plaintiff, v. UNITED PARCEL SERVICE OF AMERICA, INC., UNITED PARCEL SERVICE, INC. Defendants.	:	Civil Action No. DKC 08 CV 2586 VOLUME II

Videotaped Deposition of PEGGY S. YOUNG

Baltimore, Maryland

Thursday, May 20, 2010

Reported by: Samara J. Zink

* * *

[435] THE WITNESS:

20 part-time air drivers, and I'd say maybe 20 either – they're called combo or 22.3s, I think, drivers that had meet points in D.C.

BY MR. McGEE:

Q Okay. In 2008 and 2009, were you delivering basically the same types of packages that you had delivered immediately prior to becoming pregnant in 2006?

A In 2008, the packages tend to got a little bit heavier because there was construction in Annapolis. They were adding on to the mall.

Q And how did that change things?

A Well, because there's construction, the construction companies got some heavier packages.

Q That you had to deliver?

A Yes. And at that time, I wasn't – I already had my child, my co-worker Cici wasn't trying to coddle me anymore, because she normally would take the heavier packages for me. That's just how she was.

Q So, before you went out on leave in 2006, Cici Wills (sic) was coddling you by taking your [436] heavier packages, but sometime in 2008, she stopped doing that?

A When Cici found out that me and – my husband and I were trying to conceive, she would always take in the heavier packages. It didn't matter. It was – she had more seniority than I did, so she was considered, like, the lead person in Annapolis, so she's the one that separated all the packages, and she didn't always – she never wanted me to take anything heavy. She's the one that always took them.

And then when I came back in 2007 from having Triniti, you know, I told her, "You know, Cici, you don't need to baby me anymore." I told her that I could do it. That I – you know, I needed to do my fair share of the weights of the packages because, hence, I

think that I'm younger than she is, so that I should have done it.

Q Other than in connection with this construction that you mentioned, were the – you know, the types of packages that you handled and

* * *

[444] ready to come back to work then. I had a good ultrasound, I was out of my first trimester. I asked my doctor for the note because I was told to bring in a doctor's note with my restrictions on it. And I assumed that once I brought the note in, that I was going to be able to work, no problem, because my regular job didn't normally require me to lift 20 pounds.

Q And that's not what I asked you. My question is had you not brought in a note with a doctor's restriction, would you have been allowed to continue doing your job?

A If I did not bring in that note? I would say yeah, I'm assuming they would let me work on October 11th.

Q And if you had brought in a doctor's note that said that there were – you had no restrictions on your ability to lift, you would have been allowed to continue working in your regular job, correct?

A The only reason why I brought notes was because I –

* * *

[447] duty release that said you had no restrictions?

A Because Carol Martin requested me bring in a note from my doctor with my restrictions when I spoke with her before I went out on my third IVF treatment.

Q When you went out on your third –

A I spoke with her before I went out on my third IVF treatment. Her and some other lady came in the office and tried to talk to me so that I made sure I was doing everything correctly so I wouldn't lose my medical benefits with UPS.

Q Okay. And at that point in time, you were – you were seeking to go out on leave, correct?

A I was going to go out on leave, yes.

Q And Carol Martin said in connection with your request to go out on leave, you need to provide a doctor's note with any restrictions that you have?

A Yes. She stated that I need to have my doctor fill out my FMLA paperwork and a note if I wanted to work with any restrictions.

[448] Q But you didn't want to work at that point in time, right?

A October 11th, yes, I did want to work.

Q No, no. You said that you had that conversation with Carol Martin before you went out on – for your third round of in vitro fertilization.

A Yes. Uh-huh.

Q So, at that point, you were asking for a leave of absence, correct?

A FMLA, yes.

Q Okay. And Carol Martin said "okay. Then you need to provide a doctor's note with any restrictions that you have"?

A If I wanted to return to work.

Q Now, my question is had you provided a doctor's note that said that you had no restrictions, would you have been allowed to return to work?

A Nobody told me to bring in a note for full duty. They told me to bring in a note with my [449] restrictions.

Q Okay. Let's say you didn't have any restrictions. Let's say there were no restrictions.

A Okay. But I never would have asked for a note unless I was instructed by Carol Martin to give me a note – get a note from my doctor to bring back to UPS with my restrictions to come back to work.

Q Okay. And that's the conversation that Carol Martin had with you before you went out for your third round of in vitro fertilization?

A Yes.

Q And that was at what point in time? You can consult your timeline.

A Sometime after my second IVF cycle and I had come back to work in 2006. Early 2006.

Q Okay. And if the facts were that you had no restrictions, you would have been allowed to return to work, correct?

A But I was instructed to bring a note with restrictions. I –

Q I understand that.

* * *

[455] A Not until Carol Martin came to me in the building sometime after my second treatment, that's when she explained to me that I needed to fill out FMLA paperwork, and I need to bring in a note if I wanted to return to work with my restrictions.

Q And you found out if you didn't have – what is it – so many hours of work a month, you were not eligible for benefits?

A Yes.

Q Okay. All right. So, at that point you knew why your health insurance previously had been dropped, correct?

A But UPS wouldn't let me work, so – and Carol Martin said I didn't qualify for disability, so that's not my fault that UPS would not allow me to work.

Q That's not my question.

A I was ready to come to work.

Q Have you ever had any treatment for any learning disabilities?

A No.

* * *

[473] Q Okay. And do you have any other reason to believe that that's why her schedule was changed?

A I can't think of any other reason why your schedule would change unless you bidded for another job.

Q Did anybody in UPS management reassign Quatrice Pendleton's packages to other drivers while she was pregnant?

A Did any other management reassign her packages? Supervisors are management, so I would say the supervisor.

Q Well, I mean, Cici Richardson is the one who on her own decided to take your heavier packages, correct?

A Yes, she did it all on her own.

Q Right. So, my question is if other drivers took heavier packages for Quatrice Pendleton while she was pregnant, was that at the initiative of the drivers or was that an instruction from management?

A No. That would have been a – like Cici

* * *

[483] somebody to deliver three streets over when there was another person right there; so, basically, the drivers just kind of divvied them up.

Q So, the drivers decide – despite what management put on the list, the drivers divvied the packages among themselves?

A Pretty much.

Q Okay. Did anybody complain about India Brown?

A Not to my knowledge. I don't know.

Q Okay.

A Zim might have complained a few times at the airport when we went to the airport.

Q Complained to who?

A Just to us other regular drivers.

Q Now, you mentioned something about Tynette Williams had some type of arrangement with her coworkers –

A Yes.

Q – where they took heavier packages?

A Yes.

* * *

[506] indigestion really bad, I was short-tempered with my children because of all – not knowing what was going on with my benefits, not letting me work.

Q Did it have any other effect on you?

A It was upsetting.

Q What do you mean that it was upsetting?

A It was upsetting when you want to go back to work and you can't because you're being told that you can't work.

Q How did that make you feel?

A I was upset.

Q Okay. And when you say you were upset, what do you mean?

A Well, it was something that was always on your mind like, you know, what's going to happen to my benefits.

Q Well, you had other medical benefits, right?

A Inferior ones, yes.

Q Well, those are the medical benefits that you had been using – your husband's medical [507] benefits, correct?

A For our in vitro, yes.

Q Had you ever consulted with any doctor in connection with your pregnancy other than through your husband's health insurance?

A No. The plan was for me to go to Anne Arundel and utilize my health care through UPS. TRICARE is always a secondary insurance.

Q But the insurance that you had through your husband was superior to UPS's in that it covered your in vitro fertilization when the UPS health insurance did not, correct?

A When you say "superior," I wouldn't say "superior."

Q Okay. Well, something that covers something when one thing – military insurance covered in vitro fertilization, correct?

A They didn't cover the whole thing, no.

Q Okay. They covered some of it, right?

A Yes.

Q Okay. UPS health insurance did not cover [508] any of that, did it?

A No.

Q Okay. Which coverage was better for in vitro fertilization?

A For the in vitro cycle, the military, because UPS did not cover it.

Q Okay. Was there any respect in which you claim that the UPS-provided health insurance was superior to the health insurance you had through the United States Government –

A Yes.

Q – as a result of your husband's employment in the military?

A Yes, because I could have seen the same doctor all the time if I would have gotten to use my UPS insurance.

Q Okay. But you made no effort to see any type of doctor in connection with your pregnancy while you were covered by UPS insurance, did you?

A With my third in vitro, no.

Q Did you ever see anybody – any other

* * *

[521] A Yes.

Q And so – and do you have any reason to – and you've already told me that the in vitro process would not have been covered by your UPS insurance in any case?

A They covered some blood work. I remember them submitting stuff to my UPS, but I don't know what aspects of it. It wasn't very much.

Q Okay. Other than the lab work for the in vitro, did you have to pay for any medical expenses out of your own pocket; in other words, any that were not covered by your husband's – or through your husband's health insurance?

A No.

Q Did you discuss with anybody what you've described as the upset that you experienced as a result of being told that there was not a light duty work assignment for you and that you would, therefore, have to go out on a leave of absence?

A Cici, my husband.

MS. GUSTAFSON: Objection to the extent

* * *

[526] Q And other than what you've told me.

A No, I haven't.

Q Do you know of anybody – any employee who was given a light duty work assignment for any reason other than an on-the-job injury?

A Yes.

Q Who?

A Didn't I not give those to you earlier? Regina McNair was moved from a driver to a clerk. I believe she had a kidney disease. This isn't firsthand knowledge.

Q That's all hearsay, right?

A Uh-huh.

Q Anybody other than Regina McNair?

A Mia Johnson. She could not pass her DOT test because of high blood pressure, and she told me that specifically, that she wasn't driving anymore.

Q Was she given any type of light duty work assignment?

A I don't know what she was doing.

Q Okay. My question is was anybody, to your [527] knowledge, given a light duty work assignment for any reason other than an on-the-job injury?

A Quatrice Pendleton.

Q Anybody else?

A Charles Cox. He couldn't pass his DOT test because of high blood pressure.

Q What light duty work assignment was he given?

A I know he was working on a belt, but which belt, I don't know. I just know he wasn't in his driver uniform anymore.

Q Okay. Working on a belt is not a light duty work assignment, is it?

A It is if you're on the smalls, back in the smalls.

Q That's not working on the belt, is it?

A Yeah, it is. You're a scanner.

Q Okay.

A If you're a scanner.

Q Okay. What belt was he working on?

A I can't tell you the belt. I don't know.

[528] Q What was he doing on the belt?

A I didn't see what he was doing.

Q Was he doing a light duty work assignment?

A I don't know.

Q Okay. Was Quatrice Pendleton given a light duty work assignment?

A Yes.

Q What was her work – light duty work assignment?

A She was delivering airs, but not taking any boxes.

Q How do you know that?

A Observing her. And plus, she had spoke with me about the company working with her.

Q Okay. Anybody else who was given a light duty work assignment for any reason other than an on-the-job injury?

A Kim Campbell was sweeping out trucks. I don't know why. I don't recall the reason why.

Q When?

A I can't give you a day. I don't know [529] when.

Q For how long?

A I don't know.

Q Is that part of her regular job?

A No.

Q Was she a combo?

A Yes.

Q What was her combination jobs?

A I don't know. She changed several times. She bidded two different jobs. I know she was an early morning driver. I – I – I don't know what her other part of her job was. I know she was an EAM driver for a while.

Q How do you know she was sweeping trucks?

A It's hearsay. I was told.

Q By whom?

A Cici and somebody else told me, but I don't recall who told me.

Q Other than the people you've named, were there any employees who were given a light duty work assignment for any reason other than an on-the-job

* * *

[531] building?

A Because I was told that.

Q Who told you that?

A Who told me that? Cici and somebody else did. I don't recall who else told me that.

Q So, you have nothing other than hearsay; is that right?

A Correct.

Did I tell you Ty Williams, too?

Q Anybody else?

A Ty Williams. I know there was a gentleman – there was a couple of guys in the Annapolis building – I'm not sure their names – had DUIs that could not drive anymore, and they gave them alternative work in the building.

Q Did they have a light duty work assignment?

A Light duty and alternate work are interchangeable at work, so I –

Q I'm –

A So, if they termed it light duty or they [532] termed it alternative work, I don't know. They interchanged those two meanings.

Q Was it light duty?

A I don't know. He was not doing his regular driving job anymore.

Q Okay. Was it something that somebody could do with a 20-pound lifting restriction?

A I'm sure it was, yes.

Q Okay. What was it then?

A I don't know.

Q You're just guessing?

A Yes.

Q Well, I don't want you to guess, okay?

A Okay.

Q You don't know?

A I don't know.

Q You have no idea what they were doing?

A No. He had alternative work.

Q What was it?

A I can't say what it was, but alternative and light duty are just the same thing at UPS.

[533] Q Okay. Just tell me what work he was doing.

A I don't know.

Q Do you know of any employees who had a lifting restriction from their doctor for any reason other than an on-the-job injury?

A Quatrice Pendleton.

Q Anybody else?

A I heard Ty Williams did, but I don't know when she – she didn't tell me when she brought her note in.

Q Well, you don't know what the note said, do you?

A No, I don't.

Q You don't know if the note had a lifting restriction, do you?

A No.

Q Okay. So my question is were there any employees who had a doctor's note or medical certification including a lifting restriction for any reason other than an on-the-job injury?

[534] A None that I personally seen.

Q Are you aware of in any fashion or do you believe that there was anybody else who had a lifting restriction for a reason other than an on-the-job injury?

A Besides the others that I just mentioned prior.

Q Well, did any of those people have a lifting restriction?

A I – I – if they had their notes for their lifting restrictions, I did not see it.

Q Okay. To your knowledge, did any of those people have a lifting restriction?

A I do not know.

Q Okay. So my question is other than Quatrice Pendleton, are you aware of anybody who had a lifting restriction other – for any reason other than an on-the-job injury?

A Not to my knowledge.

Q Were there – to your knowledge, were there any drivers who could not pass their DOT [535] physical who were given a light duty work assignment? And by "light duty," I mean a job that could be performed by somebody with a 20-pound lifting restriction.

A Once again, light duty and alternative work are interchangeable.

Q But I told you –

A They were given alternative work.

Q Okay. My question is, is it a light duty job that could be done by somebody with a 20-pound lifting restriction?

A I would say yes, because they usually put them back in smalls or scanned or did AC clerk jobs –

Q Okay. Who?

A – did car wash.

Q Who?

A Mia Johnson, Mr. Cox, Regina McNair. Did I say Quatrice Pendleton? No, because she has light duty because she was pregnant, who couldn't pass her DOT. There was a gentleman named Rick. Now, he's

* * *

[540] A No.

Q Did you handwrite anything that provided input or a basis for that statement?

A No.

Q Take a look at that statement, if you would, for a moment. And in Paragraph 29, you talk about a number of different jobs that you call light duty or alternative jobs. Do you see that?

A Uh-huh. Yes.

Q Were there any openings in any of those positions at the time that you requested a light duty work assignment in October of 2006?

MS. GUSTAFSON: You can answer to the extent that you know.

A The extent that I know of, I'm sure there was an opening somewhere in there.

BY MR. MCGEE:

Q How do you know that?

A Because those are like – the time of day and stuff, there's a lot of turnover in the early mornings

and whatnot. That's from my experience [541] with UPS.

Q Do you know if there was a job opening at that particular time?

A To my extent, no.

Q Now, did you provide a statement in support of a claim by Patricia Arline-Young?

A Did I provide it?

Q Yes.

A No.

Q Did you sign a statement for her?

A Did I sign a statement for Patricia? No. Oh, you're talking about her stuff. Now I know what you're talking about. Now I know what you're talking about.

Q Well, what is it you think I'm talking about?

A I'm trying to remember what it was.

Q Well, I asked you in your deposition, "What matter did you sign a statement as a witness?" You said, "Something for Pat." I said, "Pat who?" You said, "Pat Arline-Young."

[542] A I remember now, but I can't remember what it was for. I wasn't really any part of it, but I just witnessed what the workplace – I don't know if it was against females. I don't remember what it was

for. And it was for Pat. I don't remember what it was for. It might have even been a grievance. I don't remember.

Q Who prepared the statement?

A She did.

Q When did you sign a statement for her?

A I can't recall when I signed it.

Q Was it about the time that she signed a statement for you?

A I don't think so.

Q What did your statement say?

A I don't recall. She prepared it. I don't recall. I couldn't even tell you the date. I don't remember.

Q The October 11, 2006 doctor's note that you've been referring to, what did you do after you got that doctor's note?

[543] A I took it to UPS, I give it to Ursula, I know I faxed it to Carol Martin.

Q Well, let's take it one step at a time.

What was the first thing that you did?

A I took it to UPS, and I believe I gave it to Ursula, yes.

Q And is that when Ursula said – told you that you would have to talk to Carol Martin about it?

A No.

Q What did Ursula say to you when you gave her the note, if anything?

A That she would get back with me because she was going to look for work inside the building for me.

Q Did she ever get back to you?

A A while later.

Q And what did she say when she got back to you?

A That I needed to call Carol Martin.

Q And is that when you called Carol Martin?

* * *

[551] was supposed to return to work.

Q Approximately how many, if any, phone calls did you make trying to get answers to those two questions?

A 11 phone calls from my cell phone.

Q And this was about your benefits and about the time you needed to return to work?

A Yes.

Q At what period of time was it that you made those 11 phone calls to your employer?

A July 15th to November 6th.

Q That's 2006?

A 2006, yes.

Q When did you go on leave for your third IVF attempt?

A July 25th, 2006.

Q Did you become pregnant?

A Yes.

Q When did you find out you were pregnant?

A A few days before August 26, 2006.

Q What did you understand then about when [552] you needed to return to work?

A I still didn't know. I was still trying to figure out how long my leave was going to be, you know, when I had to return to work. I needed –

(Telephone ringing.)

Q How long were you hoping to stay out on leave?

A At least through my first trimester.

Q Is that because you learned at some point that your risk of miscarriage was significantly greater during your first trimester?

A Yes.

Q Did there come a time when you asked your doctor to write a note for your employer stating what your restrictions were?

A Yes.

Q When was that the first time?

A September 13th, 2006.

Q Why did you ask for a note that day?

A Because Carol Martin instructed me that I – in order to return to work, I had to have a [553] note with my restrictions on it.

Q But why September 13? You weren't trying to return to work yet at that point, were you?

A No, I was not. I was not out of my first trimester yet.

Q And you were still hoping to extend your leave?

A I was hoping – yeah, I was hoping to extend my leave.

Q But you hadn't yet gotten an answer to your question about when you had to be back at work, had you?

A No.

Q Okay. Did you ever finally get in touch with Carol Martin about when you had to return to work?

A Yes.

Q And that's the – the testimony – the conversation you testified to earlier today after the September 13 letter when she told you that you could stay

out as – I don't remember what your [554] testimony was. As long as you wanted or what was your testimony?

MR. MCGEE: Objection. Completely mischaracterizing the testimony, objection to the form of the question.

MS. GUSTAFSON: All right. That's fine. I'm happy to restate the question.

BY MS. GUSTAFSON:

Q After that September 13 letter from the doctor, you had some – and before your October 11th letter, you had some conversation with Carol Martin, you've testified to today, about extending your leave; is that correct?

MR. MCGEE: Objection. Completely contrary to the testimony today, objection to the form of the question.

BY MS. GUSTAFSON:

Q When did you have a conversation with Carol Martin, and what was it about?

A I had a conversation with Carol Martin after my September 13th letter about, you know, if I [555] could still extend my leave, I wasn't ready to come back to work yet, that I was concerned about my benefits. She basically acted as if UPS really wasn't concerned about when I came back to work, and that she just reminded me that I needed to bring a note in with my restrictions in order to work.

Q Did there come a time that you asked your doctor for a second note for your employer stating what your restrictions were?

A Yes, on October 11th, 2006.

Q Why did you ask your doctor on October 11th, 2006 for a note?

A Because first of all, it had been a while since I'd taken my other note, and I got an encouraging ultrasound. The heartbeat of my baby was good. I was out of my first trimester. I had felt confident enough that I could return to work.

Q What did you do with the October 11th note – the October 11, 2006 note?

A I took it in to Ursula.

Q And what did you tell her?

* * *

[569] pregnancy and regard to disability discrimination. Why did you think that UPS regarded you as being disabled?

A Because they would not let me work. They said I couldn't do any job that they had in their building or any other building.

Q Was it also the way you had been coded? Was that part of it?

A Yes.

Q And you later added a race discrimination claim, right?

A Yes.

Q And this is because of – well, why did you add the race discrimination claim?

A Because T learned that Quatrice Pendleton was allowed to work while pregnant and so was Ty Williams.

Q Did you later learn about another African-American employee working some kind of light duty while pregnant?

A Sparkle Tyrie.

[570] Q And all three of those women you understood were given some sort of accommodations related to their pregnancy; is that correct?

MR. MCGEE: Objection to the form of the question.

BY MS. GUSTAFSON:

Q Is that correct?

A Yes.

MR. MCGEE: Objection to the form of the question. And it's probably clear, Ms. Gustafson, but my objection is that virtually every question of yours is a leading question.

MS. GUSTAFSON: This is cross-examination.

MR. MCGEE: Well, in fact, those rules don't apply when you're cross-examining your client.

MS. GUSTAFSON: They did when you were cross-examining for the 30(b)(6) deposition.

MR. MCGEE: I'm just stating my –

MS. GUSTAFSON: They change since last week?

MR. MCGEE: I'm just stating my objection,

* * *

[599] didn't know if it could be extended.

Q Well, when did you try to find out that, whether your leave could be extended or when your leave was up?

A After my September 13th doctor's note, I tried.

Q And what did you do at that point?

A I give that doctor's note to Ursula Blunt, and then I called Carol Martin to see if I could get my leave extended.

Q Okay. Did you speak with Carol –

A Because I –

Q I'm sorry, but did you speak with Carol Martin?

A Yes, I did.

Q Okay. When?

A After September 13th. I can't tell you the specific day.

Q What month?

A After September 13th, 2006.

Q Okay. In what month?

* * *

[601] Q If you don't know, you can say you don't know.

When did –

A I answered it.

Q When after September 13, 2006 did you first call Carol Martin?

A Sometime after the 13th.

Q Okay. Was it in the month of September?

A Yes. I was trying to get my leave extended because I didn't know how long I was going to be on leave. I was hoping to get through my first trimester of my pregnancy.

Q And did you call Carol Martin in her office?

A I believe so. That's the only number that I have for Carol Martin.

Q Okay. Did you speak with Carol Martin at that time?

A There was one time, yes, that I did speak with her. She acted like, you know, UPS didn't care when I come back, and she just reminded me that I

* * *

[603] Carol Martin told you that – to bring a note with your restrictions if you want to return to work?

A Yes. I didn't know at that time if they were going to make me come back to work or not. I didn't know if they were going to extend my leave or not. I didn't know how long my leave was going to last.

Q And you did not want to return to work at that point in time?

A Not the September 13th, no, because I was still in my first trimester. I was afraid I was going to have another miscarriage.

Q Okay. And what caused the initial – the first miscarriage?

A They don't know. Doctors don't know.

Q Okay. And why –

A It's like trying to find a piece of sand in a peanut butter sandwich. There was no history of miscarriage in my family at all whatsoever.

Q Why were you concerned that you were going to have a second miscarriage if you returned to [604] work –

A I just wanted –

Q Excuse me. – after you became pregnant in 2006?

A I just wanted to get through my first trimester because doctors tell you that that's the most timed period that you will have a miscarriage, and that once you get past that first trimester, the chance of a miscarriage decreases greatly.

Q Carol Martin never said that you should think about quitting your job at UPS, did she?

A She said I need to think about my employment with UPS.

Q She never used the word "quit," did you? Did she?

A No, but that's what I implied it as.

Q That's what you inferred?

A Well, that's what I took it as when you tell somebody "you want to think about your job with UPS." That's – what else is there to imply?

Q Okay. And that that's because at that [605] point, you had used up all your FMLA leave, correct?

A As far as I knew, yes. I was ready to come back to work at that point. That was in October. October 11th.

Q But even though you had used up all your FMLA leave, UPS allowed you to stay out even longer, correct?

A Yes.

Q Okay. And when you – after you had your baby, as soon as you were ready to come back to work, they allowed you to come back to your work to your exact same position?

A Yes. I mean, I – the way I perceived it from Carol Martin, it was like no big deal to them. That's how I got it when I was trying to make all these phone calls to make sure I was doing everything that I was supposed to do correctly.

Q After the birth of your child in 2007, did you have any particular complications that prevented you from coming to work – back to work?

A No.

[606] Q Was it a normal delivery?

A It was an induced delivery.

Q Not a C-section?

A No.

Q You didn't have any particular disability after your child was born, did you?

A Well, you have to recover from childbirth.

MS. GUSTAFSON: Objection; mischaracterization of testimony she's already given.

BY MR. MCGEE:

Q What do you mean "you have to recover from childbirth"?

A Well, if you give birth to a child, your body's not right back to the same way as it was before.

Q Was there anything that you could not do during the first two months after giving birth?

A I don't think that I could have done my regular job at UPS.

Q I understand that. And what aspects of [607] your regular job could you not have done?

A I mean, emotionally, I don't think that I could have been able to make my time restraints, I don't think that at that point in time that I could have lifted, you know, 70 pounds or anything over 20 pounds.

Q Nobody at UPS told you that you could not do any job at UPS, did they?

A No. They said I could not work until – they do not offer light – UPS does not offer light duty for pregnancy.

Q But nobody said you were physically unable to perform other jobs, did they? Other jobs at UPS.

A They never offered me another job.

Q I understand that, but nobody said –

A But physically, I could have done – I could have done small sorts, I could have scanned.

Q Okay.

A I could have done my regular job.

Q But nobody said that you – that they believed that you were physically unable to perform [608] any of those functions, did they?

A Well, I'm assuming UPS –

Q I'm not asking about assumptions. I had a very specific question about what people said, not about what you assumed.

A Well, nobody said anything to me, period. Just that I brought in a note with my restrictions, and that they don't offer light duty for pregnancy.

Q Okay. And nobody said that we do not believe you are physically able to do any of the other jobs that you have talked about at UPS?

A Nobody ever off – the only person that said that they would look for something was Ursula who said, "I'll look for light duty," but then she referred me to Carol Martin.

Q Did anybody say that they thought you were physically unable to do any job at UPS other than your regular job?

A Well, I assume that they thought I could –

Q I'm not asking what they assumed.

[609] A Okay.

Q I'm asking did anybody say anything?

A Nobody said that, that I was not allowed to do any other job at UPS.

MS. GUSTAFSON: Can we get a time? I think that we're past time.

MR. MCGEE: Do you want to take a break?

MS. GUSTAFSON: No, no, no. I don't need a break.

MR. MCGEE: Okay. Well, then –

MS. GUSTAFSON: I'm talking about your 3 hours and 40 minutes that you agreed to.

MR. MCGEE: Okay. Well, I don't want to take – if you want to take a break to count time, fine; otherwise, I'm not going to have my time being used by you.

MS. GUSTAFSON: Oh, I see what you're saying. Sure. Yeah, we can take a break.

Do you see there what the time is?

THE VIDEOGRAPHER: 214 minutes.

MR. MCGEE: We're going off the record.

* * *

[612] from driving?

A No.

Q Did you ever talk to Charles Cox about what work he was performing while he was medically disqualified from driving?

A Not what work he was doing, no, but that what he wasn't driving anymore because he was on medication because of his high blood pressure, that he couldn't pass his DOT.

Q When did that conversation occur?

A I can't recall the month or the – I don't even know if it was two – it was 2007 or 2008. I'm more apt to say it was 2008.

Q So, what did he tell you?

A That he was taking medication that impaired him from driving, that he had high blood pressure, and that he couldn't pass his DOT.

Q Do you know anything about what work he was performing when – while he was medically disqualified from driving?

A No.

* * *

[614] Q Were you ever, while you were pregnant in 2006 and 2007, medically unqualified to drive?

A Not medically unqualified, no.

Q Well, were you unable to drive in any way?

A I could drive.

Q Okay. And did you drive?

A Yes.

Q Did you drive throughout your entire pregnancy?

A Yes.

Q Did you drive your – your – your own car wherever you wanted to go?

A Yes.

Q Up until the day you delivered?

MS. GUSTAFSON: Objection; outside the scope of cross.

BY MR. MCGEE:

Q Ms. Gustafson asked you some questions about your calls or efforts to contact Aetna and UPS about the status of your – your benefits. Do you recall that?

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff, vs. UNITED PARCEL SERVICE, INC., Defendant.	)	Civil Action No. DKC 08cv2586

* * *

The deposition of JERRY GORDANIER was taken on May 25, 2010, commencing at 9:25 a.m. at 4041 North 21st Street, Arlington, Virginia, before Paula L. Lowery, Notary Registration No. 162073, Notary Public.

* * *

[6] (MR. McGEE) And 37, I got your e-mail about providing some additional information. I think we'll be able to satisfy you.

MS. GUSTAFSON: We could do it by deposition or –

MR. McGEE: I think we'll satisfy you, and 57 and 58 we'll look and see what's out there, and we'll satisfy you in that respect as well.

MS. GUSTAFSON: All right. We've got a very short list here.

BY MS. GUSTAFSON:

Q. Mr. Gordanier, you said you just retired.

A. Yes, I did.

Q. When was that?

A. March 11th.

Q. How long had you been with UPS?

A. Almost 35 years.

Q. What was your position with UPS?

A. When I retired, it was the West Region Labor Relations Manager.

Q. How long had you been in that position?

A. Two years.

[7] Q. Were your positions the other 25 years labor related?

A. No.

Q. What sort of things were they, if you could just characterize them generally?

A. Well, I started in California in 1975 as a part-time employee.

Q. Were you a delivery person?

A. Yes, that was –

Q. I love these stories.

A. It was 1975, I started out of San Francisco as a part-timer. That's when very few part-timers were hired at UPS. They were trying to get students and working them a short period of time.

Then from that position I went to being a driver for about eight months, then I went into supervision. From there: full-time supervisor in the preload, on car, then center manager, then division manager and operations for years.

Then transferred five or six times, just in California, at that time.

[8] Then I went into labor relations in 1993 in California.

Q. Did you have any special training for labor relations, or is this expertise that you acquired on the job?

A. A lot of it was on the job because years ago we didn't have specific "labor managers". The division managers and center managers were the labor managers of that time.

It got to be a little more time consuming, so then they started designating actual labor people, which was on the job through negotiations, through grievance hearings, and then we started doing classroom-type training.

Myself, I had been through several schools in New York and through the labor relations portion of it

after I came into labor; and, of course, our own internal labor schools we had.

Q. At UPS?

A. Yes.

Q. Were you involved in negotiating the [9] collective bargaining agreement?

A. Yes.

Q. I understand that there is a nationwide collective bargaining agreement, and there are individual regional supplements, is that correct?

A. That's correct.

Q. So you were involved in negotiating the national collective bargaining agreement, is that right?

A. I was involved in the national negotiations in 1997, 2002, and 2008. I was involved in the area supplemental in 1993.

Q. Was that for the area out west?

A. Correct.

Q. How many different area supplemental collective bargaining agreements does UPS have in the U.S.? Is it just East Coast, West Coast, or are there many of them?

A. There's many of them. Before there was a national agreement, you only had area supplemental agreements, so those were tied to the national.

Q. Oh, I see. So the area agreements [10] preceded the national agreement?

A. That's correct.

Q. When was the first national agreement?

A. I want to say it was in the '80s. I wasn't in the labor relations part of it at that time, but I believe in the '80s was the first national.

Q. I want to make sure I'm remembering correctly about these provisions and which agreement they're in.

All the provisions regarding temporary work, alternative work, alternate work, inside jobs, they are here in the national agreement it looks like, isn't that correct?

A. That's correct.

Q. So you have never had any involvement with the supplemental agreement for the – is it called Mid-Atlantic? The Atlantic area.

A. I have not.

Q. These agreements are typically six years in length? Is that right? Or does that vary too?

A. It varies. Earlier contracts were three [11] years. The reason for that was mainly because the

union wanted to be able to renegotiate an earlier contract. We didn't want to be tied into a long-lasting contract.

Then it got to be because the demographics were changing with their customers, we wanted a longer contract to put the customers at ease that not every three years we would have to go to the table to bargain.

During every negotiation, you would lose a certain portion of your business; and we wanted to secure that for a longer period of time.

Q. It's very time consuming.

A. It is.

Q. How many months do those negotiations go?

A. We were just talking about that. It's about eight months to go through it.

Of course, you have other supplements. You have the supplemental agreement. You may have other contracts or agreements for clerical and such that takes up your time.

Q. I notice Article 16, Section 4 regards [12] maternity and paternity leave.

The second paragraph is one sentence that reads: "A light duty request certified in writing by a physician shall be granted in compliance with state or federal laws if applicable."

A. Which one are you reading from contract wise? Are you reading from –

Q. 2002 to 2008.

A. Oh, okay. I brought copies of the supplemental agreements.

Q. Do you see Section 4?

A. Yes.

Q. Then the second sentence is what I'm directing your attention to.

A. Okay.

Q. My question is in what states does UPS provide light duty to a pregnant woman who has a light duty request certified by her physician under this provision?

A. The only state is California.

Q. What law does California have with regard – that makes this true in California?

[13] A. There's a state law that requires the company to offer the right for light duty for those pregnant employees upon qualification.

Q. How long has that state law been in effect?

MR. McGEE: If you know.

THE WITNESS: I'd be guessing –

MR. McGEE: Don't guess.

BY MS. GUSTAFSON:

Q. Tell me what you know about what it was prior to?

A. It was prior to 1997.

Q. If you know, can you tell me what the law is? You don't know a reference for it, do you?

A. No, I only know that there is a law that says you have to offer light duty work for pregnant employees.

Q. Do you happen to know the name of the law in California?

A. I do not.

Q. When was that provision first put into the collective bargaining agreement?

[14] A. 1997.

Q. You have pages of notes in front of you.

A. Yes.

Q. Can you tell me what they are?

A. These are my own notes that I put together based off of the questions of 52, 53, and 54 that Mr. McGee had said these are the questions.

Q. Okay.

A. So what I did was try to go back from my own personal knowledge of the collective bargaining

agreements, from arbitration and my experience with the collective bargaining agreement and put together some notes.

Q. May I make a copy, and we'll put it in as an exhibit.

A. Sure.

MR. McGEE: Sharon, can you make me a copy as well?

MS. GUSTAFSON: Of course, I will.

(Gordanier Deposition Exhibit Number 1 was marked for identification.)

[15] BY MS. GUSTAFSON:

Q. You said the provision first came into the agreement in 1997?

A. Correct.

Q. Is that because the California law became law in 1997? Or what was the reason for it?

A. Well, the law was in there prior to 1997, and I was in California at that time as the regional labor manager.

The chief negotiator for the Teamsters was Carolyn Robinson, and she was from my area. She was aware of the law. She discovered the law, so she was pushing us to put it in the local agreement that light duty would do that.

Because of the politics with the Teamsters at that time, Carolyn had elevated herself into a position of authority at the national negotiating committee, and she was the head of the safety and health committee that I was a part of also.

So she made a proposal during 1997 of having, basically, unqualified rights for light [16] duty for pregnant employees.

Q. At the national level.

A. That's correct.

Q. You're saying it was Carol?

A. Carolyn Robinson.

Q. And who was she employed by?

A. She was employed by the Teamster's Local 315 out of Northern California.

Q. So she made this proposal that there be light duty for pregnancy nationally?

A. Correct, with no limitations.

Q. What happened to that?

A. We rejected that proposal.

Q. This is in 1997?

A. Correct.

Q. Then what happened?

A. Then they came with a counter, and we countered back and forth, and then we ended up with the language that you see in the collective bargaining agreement now that provides light duty to pregnant employees that are required by state or federal law.

[17] It was understood at that time that the only state that had that was California.

Q. Was UPS concerned that employees in the other 49 states would see this provision and think they were going to be entitled to light duty if they had a light duty request from their doctors?

A. If they were concerned, they didn't show it at the bargaining table. We signed off on that proposal which then became part of the contract.

Q. Who understood at the time that it was only going to be applicable in California?

A. Well, the chief negotiator, Carolyn Robinson, knew at that point, the negotiating committee knew at that point.

It was even in 2002 when they tried to put – in the 2002 negotiations which Carolyn Robinson wasn't part of, she was not the chairperson, Mike Noble was the chairperson along with – ours was John Fitzgerald for the company.

They acknowledged that it was understood that it was only applied to California.

Q. The sentence we've been looking at talks [18] about light duty being granted in compliance with

state or federal laws. What were the federal laws that were referred to there?

A. Well, if there was a federal law that came across that granted it for all pregnant employees or pregnant employees through the entire United States, that we would apply that to the contract. A provision for light duty for pregnant employees.

Q. So that sentence actually didn't give any rights to any employees because what you're saying is in California it was required by state law.

A. Correct.

Q. And the only way that any employees would get it in other states is if it was required by federal law.

A. Federal or state, correct.

Q. Did a federal law ever get passed that you think relates to that?

A. I'm not aware of any law that was ever passed – federal or state – in any other state besides California.

[19] Q. Prior to 1997, was there any similar provision in the collective bargaining agreement?

A. Similar to pregnant employees?

Q. Related to maternity leave or light duty in the case of pregnancy.

A. No, the only section was 16.4 that granted a leave of absence for those employees who were pregnant. They would be allowed a leave of absence, provided they had medical documentation that says I can no longer do the essential job functions. They were allowed leave of absence without termination.

Q. Do you have a copy of that provision?

A. Well, the provision is in 16.4, the first paragraph, it stipulates –

Q. So that first paragraph – go ahead.

A. It stipulates that we would allow them time off, or a leave of absence, because this whole language is under the leave of absence language.

Q. So the first paragraph preceded 1997.

A. Correct.

[20] Q. How far back did it go?

A. It was before 1993 because in 1993, when I got involved in it, the language is already intact.

Q. But you don't know how far back – when it started?

A. No.

Q. Was there ever a time when the second paragraph, which is the sentence we've been talking about about light duty being granted with a doctor's note, was there ever a time when that was in the local agreement, but not in the national agreement?

A. No.

Q. Do you have knowledge of the grievances filed by employees in the Metro D.C. district related to that provision?

A. The only knowledge I had – and I talked to Eric Bringe and Mark Herron, which were the labor managers from the 2002 to present.

They were previous labor managers, and they indicated to me that there were no grievances [21] filed under Article 16, Section 4.

MS. GUSTAFSON: No further questions.

MR. McGEE: I don't have any questions.

(Brief recess.)

BY MS. GUSTAFSON:

Q. I just thought of and asked a follow-up question as to whether or not Ms. Robinson is alive, and the answer was?

A. Yes.

Q. And she's working for?

A. Local 315.

Q. She had been working for Teamster's Local 315?

A. Correct.

Q. And you understand she's now –

A. I understand now she's working for some legislative body in the Northern California area.

Q. Do you know any idea about what legislative body that might be?

A. I do not.

MS. GUSTAFSON: Thanks.

(Reading and signature not waived.)

No. 12-1226

In The
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX, VOLUME II

SAMUEL R. BAGENSTOS
Counsel of Record
625 South State Street
Ann Arbor, MI 48109
(734) 764-1358
sambagen@umich.edu
Counsel for Petitioner

MARK A. PERRY
Counsel of Record
GIBSON DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, DC 20036
(202) 955-8500
mperry@gibsondunn.com
Counsel for Respondent

Petition For Certiorari Filed April 8, 2013
Certiorari Granted July 1, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff v. UNITED PARCEL SERVICE, INC. Defendant	:	Civil Action No.: DKC 08 CV 2586

Deposition of YNDIA TRACIE BROWN

Greenbelt, Maryland

Monday, June 7, 2010

9:02 a.m.

Job No.: 3-179491

Pages 1-21

Reported by: Beatriz D. Fefel, RPR

* * *

[14] BY MS. GUSTAFSON:

Do you have any questions, Mr. McGee?

MR. McGEE: Yes, I do.

Miss Brown, hi. My name is Emmett McGee. I represent United Parcel Service in a lawsuit that Peggy Young has filed. I do have a few questions for you.

THE WITNESS: Okay.

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. McGEE:

Q The combo job that you described that you have, that is something that you bid on and were awarded based on your seniority under the collective bargaining agreement, correct?

A Yes.

Q As an EAM air driver, you are required to deliver packages over twenty pounds on occasion, aren't you?

A Whatever comes in, yes.

Q And that includes packages over twenty pounds?

MS. GUSTAFSON: Objection,

A Yes.

[15] MS. GUSTAFSON: Outside the scope of direct.

A They could be higher than twenty pounds.

Q And while you're performing the other part of your combo job which you described as involving address correction, that also requires you to lift and move packages over twenty pounds, doesn't it?

A Oh, yes.

MS. GUSTAFSON: Same objection.

Q Now, Miss Gustafson asked you some questions about Charles Cox and what he – what work he performed while he was unable to drive. And I believe you said that Charles Cox's regular job was a combo job, correct?

A Yes. The first part of his day was inside the building.

Q Okay. So the first part of his regular combo job was inside the building?

A Yes.

Q And is that what he continued to do when he was unable –

A After –

Q – to drive?

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff v. UNITED PARCEL SERVICE, INC. Defendant	Civil Action No.: DKC 08 CV 2586

Deposition of SPARKLE LEA TYREE

Greenbelt, Maryland

Monday, June 7, 2010

9:48 a.m.

Job No.: 3-179491

Pages 1-18

Reported by: Beatriz D. Fefel, RPR

* * *

[13] THE WITNESS:

really didn't want to be involved with any lawsuit she had going on.

BY MR. McGEE:

Q You were never worried or concerned that you would lose your job at UPS if you signed the statement, were you?

A No.

Q In your job as an air driver, are you regularly required to deliver and handle packages over twenty pounds?

A Yes.

Q When you were REDACTED and presented the HR person in the D.C. building with your doctor's note REDACTED, did the HR person know REDACTED?

A Hunh-unh.

Q You have to answer –

A No, not the ones in my building that I presented the letter with. No.

Q And were you REDACTED?

A No. REDACTED

REDACTED

MR. McGEE: I have no further questions.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff v. UNITED PARCEL SERVICE, INC. Defendant	Civil Action No.: DKC 08 CV 2586

Deposition of MICHAEL WAYNE HILL

Greenbelt, Maryland

Monday, June 7, 2010

11:11 a.m.

Job No.: 3-179491

Pages 1-33

Reported by: Beatriz D. Fefel, RPR

[5] PROCEEDINGS

MICHAEL WAYNE HILL

having been duly sworn, testified as follows:

EXAMINATION BY COUNSEL
FOR THE PLAINTIFF

BY MS. GUSTAFSON:

Q Thank you for coming, Mr. Hill.

A You're welcome.

Q I understand that you don't know my client, Peggy Young, and I'm not asking you questions about her situation. I just want to know a few things about your situation, and I don't think the deposition will take a long time.

You understand that you're testifying today under oath under penalty of perjury just as if you were in a court of law?

A Yes.

Q And your testimony is being taken down.

The reason I'm asking you questions is that I'm going to ask questions to find out what happened to you in certain situations at UPS.

I understand – are you currently a UPS employee?

[6] A Yes.

Q What do you do there?

A I'm a driver.

Q Okay. How long have you been a driver?

A Going on seven years.

Q Which kind of driver are you?

A I'm a regular ground and air – I'm not an air driver, as I believe she's an air driver. I'm a regular delivery driver.

Q Is it correct that for some period of time you were unable to drive due to a driving under the influence conviction or something like that?

A Yes.

Q When was that?

A That was last, last year. Like May, I believe.

Q Of 2009?

A Yes.

Q Did it happen once, or more than once?

A Just once.

Q One time. And how long were you unable to drive because of the DUI conviction?

[7] A I was unable to drive for a hundred and twenty days. My license was suspended.

Q Did you continue to work at UPS during that time?

A For a period of time, not the whole entire hundred and twenty days.

Q Okay. What period of time did you continue to work at UPS?

A I guess with, with being a driver, it was probably like a little – about a month, a little over a month probably.

Q I don't know what you mean –

A Probably –

Q – "would be."

A – a little –

Q No. I understand over a month. But what do you mean with being a driver?

A They had another – I had like another driver drive while I navigated. I still was able to do the delivery, I just wasn't able to physically get behind the wheel of a vehicle.

Q Okay. And this lasted for about a month?

[8] A Or – give or take, a little more probably.

Q Could it have been two months?

A Probably about six weeks or something like that.

Q Okay. So correct me if I'm wrong. I understand that for about six weeks after you had your DUI conviction you continued to go out on your regular route and make deliveries, but UPS had somebody else drive for you; is that right?

A Yes.

Q And you drove your regular route?

A Yes.

Q Okay. Is that a full-time job, or a part-time job?

A Full-time.

Q Okay. When route is it that you do?

A At that – during that time I did the National Harbor.

Q And then what happened?

A Then they, they weren't able to do – provide me with that because of the volume or something per se. I was told that because I had a DUI [9] it was something that, you know, that was my responsibility, it wasn't something that happened at work, so they didn't have to authorize – give me eight hours a day. So that was just something, you know, at the time. And then I was offered to work preload at a lower pay rate, and that was part-time; that was only like, like four to five hours a day.

Q Did you take that job?

A I took it for, for a period of time, but the pay rate was so low that it, it was costing me just as much money to come into work, you know, because I live so far out, and what I was spending on gas, it was like you not really making any money. So I'm like getting up at like two-thirty, three in the morning to come in for like four or five hours, and it wasn't adding up.

Q So you did it for how long a period of time, do you think?

A I did it a little mixture where for a few weeks they, they would have us come in, there was another driver who had a DUI similar as well, and we would

load the trucks and then go out and help like a [10] driver for like three or four hours to try to get us eight hours. But we were told that they didn't have to guarantee us eight because the DUI was something that that we – it happened on our own. So once the total eight hours weren't available and it was just the four, I just went on and just said I'll just sit it out and wait until my license is reinstated.

Q How long did you sit it out before your license was reinstated?

A Probably a little over a month. And the thing is, my case was, was dismissed, but I still had to serve the hundred and twenty days suspension because the MVA intervenes on it anytime that there's any part of the test that is refused. So it goes down as a refusal which carries a hundred-and-twenty-day suspension regardless of the outcome of my case.

Q Are you talking about the suspension of your driver's license?

A Yes, the driver's license suspension.

Q This wasn't a suspension from UPS?

A No.

Q So you were – you were without your license [11] for a hundred and twenty days, that's about three months – I mean, excuse me –

A Four months.

Q – that's about four months. Thank you. And the first month and a half you went on your regular route, somebody else drove and you made the deliveries?

A Right.

Q And then for another month or so you did the –

A Preload.

Q – the preload and they tried to put together a couple of different jobs but it wasn't quite coming to eight hours?

A Right.

Q Did it come to eight hours a day for a while and then it quit coming to eight hours a day? What happened?

A You'd – maybe Monday you'd have eight, maybe Tuesday you might just get six. It was – you know, it fluctuated. It wasn't – because like I said, they put an emphasis it wasn't guaranteed, they [12] didn't have to guarantee you the eight, so it was more like, you know, a courtesy or trying to help you get the hours.

Q Who was trying to help you get the hours or extend you the courtesy?

A Management at the time.

Q Who was it? Do you remember?

A It was during the transition. I know Rob Hatcher was the manager at one point, and we – then Barry Carpenter came in as the manager, you know. They switched – Rob had went to another center or something.

Q Did they both try to help you?

A Yes.

Q What center were you working in?

A Anacostia.

Q Was it out of the D.C. building?

A Yes.

Q What was the pay rate, your normal pay rate before the DUI?

A Like twenty-eight and some change.

Q And what was the preload pay rate you were [13] offered?

A Like a third of that, if that. I mean, it's probably like ten or twelve – I end up – I don't know how they did it. I guess they based some of it on my time there. So it was about fifteen dollars an hour or something, like less than half of what, what I'm used to bringing – making. Half the rate and half the time.

Q How many hours a week were you working during the period that you were trying to do the preload work?

A Just the preload alone?

Q Well, no. The combination that they were trying to come up for you as a courtesy to help you. How many hours a week did that come to?

A It varied. I mean, you may have something like thirty-something. Nothing over forty.

Q Why did your arrangement that you first had worked out where you made the deliveries and somebody else did the driving, why did that come to an end?

A I have no idea. Somebody, you know, made a decision up above that – you know, I was told that [14] the work volume wasn't enough to have two drivers or, you know, something of that sort. I, I wasn't the one making the decision. I just – you know, it just rolled down the hill on me. So .

Q When you first started doing it, did you understand that it was going to last until you got your driver's license back?

A I thought that maybe that would have – that would be – I would be able to do that and still maintain the forty hours of work until I got it back, I just would have to go – you know, my hours just wouldn't be as a driver, I may have to make it up a few hours doing this. So that was my understanding, but –

Q Who told you that?

A When I – I asked the shop stewardess about it and I asked the man – I asked Rob Hatcher. I asked the manager, Rob.

Q And what did he tell you?

A He said that you can get the forty, but like he said, we'd have to have somebody else drive or, you know, do a little stuff in the warehouse or whatever, [15] whatever have you.

Q Did he explain why after six weeks or so you weren't allowed to do that anymore?

A Well, that's – what came up is that the work volume, it wasn't – their numbers weren't adding up right with having two drivers and only delivering this amount of stops. So it was – I guess it was bad with their numbers on their report. But like he said, they didn't – it was emphasized to me that we don't – you know, you don't have – we don't have to give you your forty hours.

Q Carvette Welch was your roommate at some point; is that right?

A Yes.

Q Is he still?

A No.

Q Were you aware of a situation where he had been put on light duty answering phones for a while?

A I don't recall him being on light duty before. But that, I – think that may have been before I – we were roommates, though.

Q When were you roommates?

[16] A Last year.

Q How long a period of time?

A About nine months or so.

Q Does he still work at UPS?

A Yes.

Q Do you know if he was there today?

A No, I don't.

Q Do you still see him at work?

A I haven't been – I haven't been at work, but I talk to him. I haven't spoke with him anything regarding this case or anything.

Q You haven't been at work since when?

A Over a month now.

Q Is it because of your DUI?

A No.

Q What's it because of?

A Workmen's Comp.

Q Oh. What's your injury?

A It's a reoccurring injury to my right knee.

Q Have you ever worked light duty at UPS related to this injury, or any other injury?

A Yes.

[17] Q When was that?

A Like immediately, I guess, following the date of injury. They, they offer you thirty days of light duty, I guess.

Q What did you do?

A Answer phones, sweep the trucks out, just – nothing that – you know, it's kind of like an inconvenience, you know, you have to come in at any hours, just as long as it's like four hours a day.

Q Did you get paid your regular rate for that?

A Oh, no. I think under the new contract they're technically supposed to pay you your regular rate. But, no, not at that time. It was like eight, twelve dollars an hour, something like that. Nothing you can maintain your lifestyle or your living or any expenses, like your bills, you wouldn't be able to

Q So you only did that for thirty days; is that right?

A Right. After thirty days the, the insurance like kicks in and pays the full, I guess, your full compensation per week.

[18] Q Oh. So you work for thirty days at a reduced rate and then your insurance gives you a hundred percent of your –

A No, it doesn't come out to a hundred. It's like – at that time it was like eighty percent of what you – I guess they calculate your last six weeks of pay before your injury, and they, you know, they round it off between that, and it's usually like eighty percent.

Q Is this the only time that you'd ever been on light duty at UPS?

A No. I was on light duty before, like in my first year, I think, year and a half. I like injured my rotator cuff. And I, I didn't really speak with a shop steward or anything, and I was out on Comp. and they had me come out on light duty, but it was to scan like the packages as they go down the belt, and it was difficult because I can only really use like one arm, and it's still like the same packages that I load on the truck.

Q You didn't have to lift them, but you had to scan them; is that right?

[19] A Right. I still had to move them, so it was difficult because I didn't want to use the arm that was injured, so it was forcing me to use the other arm more.

Q So you weren't on small stores; is that right?

A No. Whatever came down the belt.

Q For the ground deliveries?

A Ground, air, whatever.

Q How long did you do that?

A I think like a few weeks. It was so long ago. It probably was like a month or so, or a little less, before I came back.

Q Did you get disability pay at that time?

A No. I got a bogus letter saying something about my claim was denied and something about the case in Virginia or living – I was like I don't live in Virginia nor do I work in Virginia. So I didn't, you know, go any further with it because I had came back to work. But I knew that it was denied and it was some type of bogus letter, so, you know, it left a bitter taste in my mouth knowing that, you know, I was [20] being bamboozled or, you know, putting the sheep over my head. It wasn't a good feeling.

Q Did you get – continue to get your insurance benefits, your employment benefits paid while you were on light duty?

A That I know of, yes. I didn't have to – you know, I didn't get any type of further injuries or, you know, any need to go to the doctor for anything.

Q Did you ever take any other medical leave other than what you've already testified to?

A No. Besides like a regular funeral, death in the family, no.

Q You've never had a situation where you lost your DOT card for some physical condition, have you?

A No.

Q Do you know anybody who has?

A I can – I'm trying to remember who – I remember hearing that a driver, I guess their pressure was too high or something like that.

Q Blood pressure?

A Yeah. But I think they went back like [21] within a week or so. I couldn't – I just remember hearing about it, but nothing concrete. I don't want to, you know, put it down as confirmed or anything.

Q You said that there were two employees who couldn't drive because of DUIs. Who was the other one?

A The other one was a James Kennedy.

Q How do you spell his last name?

A I don't even know. I think it's C-A-N-N-A-D-Y. I'm not sure.

Q Is he still at UPS?

A No, he's not.

Q Where does he live, do you know?

A I think Temple Hills.

Q Do you know his phone number?

A Not offhand. I don't know.

Q What's your phone number?

A 202-369-4747.

Q What is your mailing address?

A 7912 Barclay Place, White Plains, Maryland, 20695.

Q When you came back to work after your DUI, [22] were you required to bring with you any kind of note from your doctor or anything?

A No.

Q Were you required to take any sort of substance abuse counseling or treatment?

A I was – I was told that it, it wasn't required but it would be – I was advised it would be beneficial to help my case, to show that I was, you know, receiving some type of help.

Q Did you do that?

A Yes, I did.

Q What did you do?

A I had to go see a few different therapists.

Q What case are you talking about? It would help what case? Your Workers' Comp.?

A No. My DUI case.

Q Oh, your criminal case?

A Yes.

Q Yes. Okay.

A Yeah, like with me going to court. I'm sorry.

Q That's all right.

[23] Were you ever told anything about when you had to be back at work by UPS?

A What do you –

Q Or could you just come back whenever you got your driver's license back?

A As far as the DUI?

Q Umh-humh. Yes.

A Once I got my license back, once my license was reinstated.

Q You could come back?

A Yes.

Q Who told you that?

A Management.

Q You've testified about some of the work that you did when you were on light duty, and I just want to make sure I know all of it.

You talked about being a scanner. Was there anything other than being a scanner that you did?

A Loading trucks – oh, the light duty? Like you sit in an office, I guess like answer the phone. But I know that because of my light duty case and the DUI's a little different because it's something that,

* * *

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. McGEE:

Q You are African-American, correct?

A Yes.

Q You are a full time bargaining unit employee at UPS?

A Yes.

Q Now, you testified that when your license was initially suspended with DUI, you rode along with another driver and helped deliver packages –

A Right.

Q – correct?

And in performing that work, you regularly were required to lift packages over twenty pounds?

A Yeah.

Q And then after some period of time when you were assisting the other driver delivering packages, you were then assigned to the preload operation, correct?

A Yes.

Q And working on the preload you also were regularly required to lift packages over twenty [27] pounds, weren't you?

A Yeah.

Q And in some cases up to seventy pounds?

A Correct.

MS. GUSTAFSON: Objection. Outside the scope of direct. This whole line of inquiry didn't – was not gone into on direct.

Q And you're currently off of work due to an on-the-job injury?

A Yes.

Q And that's an injury to your knee?

A Yes.

Q And were you offered temporary alternative work, or TAW, initially in connection with that on-the-job injury?

A What, the first time?

Q (Nodding.)

A Yes.

MS. GUSTAFSON: Could you clarify the timing, what he means by first time?

MR. McGEE: Yeah.

---

[28] BY MR. McGEE:

Q When you say –

A When the initial – the injury initially –

Q First occurred.

A Yes.

Q When did that injury first occur?

A Over a year ago.

Q Yeah.

A During – when that injury occurred they did offer light duty.

Q Have you ever heard the term TAW –

A Yes.

Q – or temporary alternative work?

A Yes.

Q Is that what you were offered?

A Yes.

Q And did, part of that TAW involve scanning packages at that time?

A For the knee injury, no, it didn't.

Q Okay. What did that involve?

A Like coming in the office, sitting in the office. And what else did I do? Sweep the trucks.

* * *

[30] period of time some TAW or temporary alternative work?

A Yes.

Q And that TAW at that time included scanning packages?

A Yes.

Q And that involved lifting and moving packages that were coming down the conveyor belt and then scanning them?

A Yes.

Q In performing that work, were you required to, to push and lift and pull packages weighing over twenty pounds?

A Yes, it was.

Q Okay. In some cases did those packages weigh up to seventy pounds?

A Yes.

Q How long did you actually perform that work?

A For a few weeks.

Q And at that point you decided I can't do – you physically were unable to continue doing it because of your injury?

A Because of that, and I also was, was denied

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff,	:	
v.	:	Civil Action No. DKC 08 CV 2586
UNITED PARCEL SERVICE, INC. Defendants.	:	VOLUME I

Deposition of REGINA ODESSA McNAIR

Greenbelt, Maryland

Monday, June 7, 2010

12:07 p.m.

* * *

[5] EXAMINATION BY
COUNSEL FOR THE PLAINTIFF

BY MS. GUSTAFSON

* * *

Q What is your job at UPS?

THE WITNESS:

A I'm an air driver.

Q Full time, or part time?

A Part time.

Q Morning, or afternoon?

[6] A Evening.

Q How long have you had that job?

A About twelve, twelve years, eleven. Yeah, between eleven and twelve years.

Q Is that how long you've been with UPS?

A I've been with UPS thirteen years.

Q What did you do before?

A I was a clerk.

Q What do you do as a clerk?

A Address correction.

Q Was that also a part-time job?

A Yes.

Q Was that in the D.C. building?

A Yes.

Q And you're currently working out of the D.C. building; is that correct?

A Yes.

Q I understand that you were out of work due to illness in 2008?

A Umh-humh.

Q I'm sorry. You have to say yes or no.

A Oh.

[7] Q Only because the court reporter –

A Yes.

Q – can't take down umh-humh.

A Yes.

Q Was this when you had kidney disease?

A No.

Q Okay. What was your illness in 2008?

A I had a stroke.

Q I'm sorry to hear that.

Was there an episode when you had kidney disease?

A I was hospitalized for a little while.

But

Q When was that?

A That might have been in '07.

Q How long a time was it?

A I might have been out a month or two, something like that.

Q Okay. And was that with a kidney condition?

A Yes.

Q Okay. Did you become ill at work and then go out on leave; is that what happened?

[8] A Yes.

Q And can you tell me as best you can when that was?

A That was in '06. December? Either the end of November '06 or early December.

Q And at the time that you became ill at work, you were doing your air driver job; is that correct?

A Yes. I was doing extra work.

Q What extra work were you doing?

A I was working on a Saturday.

Q As a driver?

A Umh-humh.

Q As an air driver?

A (Nodding.)

Q And that was – you became ill at work and that was immediately prior to your hospitalization in 2007, or the end of 2006?

A Yes.

Q So that hospitalization you talked about earlier, you were estimating 2007, it actually began –

A Yeah.

[9] Q – late 2006?

A Yes.

Q Okay. When did you return to work from that incident?

A I think I came back the beginning of February.

Q 2007?

A '07, yeah.

Q And did you go back tore regular air driver job, or did you do something else at that time?

A No. I went straight back to air driver.

Q Did there come a time when you were unable to secure your Department of Transportation, your DOT card due to your medical condition?

A In '08.

Q When was that –

A When you say secure it, what do you mean?

Q Pass the test or whatever you have to do to have your DOT card. Did there come a time when you couldn't have your DOT card because of your illness?

A I was told by UPS law, that I had to stay inside for a while.

[10] Q When was that?

A But I didn't fail any portion of the DOT.

Q Okay. When was that?

A '08, in '08, December – well, I guess I got clearance the end of November '08.

Q In November '08 is when UPS told you –

A The end of November '08. Because I returned like the first, I want to say the first full week in December, on a Monday. I think it was something like December 3rd, during that year, which was the first full week.

Q Okay. This is after your stroke in 2008 –

A Umh-humh.

Q – is that correct?

All right. Tell me – I want to get a better picture of the time. When did you have a stroke in 2008?

A In March.

Q It's good to see you looking like you're doing so well. I hope that you are.

So you were out from March of 2008 until the end of November or the beginning of December of 2008; [11] is that correct?

A Begin – yeah, the beginning of December I was cleared by my doctor, but I returned the first full week in December of '08.

Q And that was when UPS told you that by law you had to stay inside for a while; is that correct?

A Well, the UPS doctor, umh-humh.

Q Did he tell you why you had to stay inside for a while?

A UPS policy.

Q Do you know anything about the policy?

A No.

Q How long did you work inside?

A Until the beginning of March '09.

Q What did you do for your inside work?

A Clerk.

Q What was the nature of your job as a clerk?

A Well, I basically just made phone calls. I didn't do any computer work.

Q Were you paid your usual rate of pay while you were inside?

A Yes.

[12] Q And did you work your usual number of hours while you were inside?

A Sometimes, not all the time.

Q What were your regular hours as –

A Air driver?

Q (Nodding.)

A I worked normally four and a half to five hours a night.

Q Five days a week?

A Yes.

Q And how many hours were you normally working for this period of time when you were inside?

A I want to say anywhere from three and a half to possibly four.

Q And why was that?

A Cutbacks since I've been back.

Q Do you know what the reason for the cutbacks were? Was it company-wide? What do you know about it?

A Well, no, I don't know if it's company-wide, but among the clerks I was told.

* * *

[15] Q Do you know anybody – let me ask you this first. Did you ever have any other occasions where you were given any kind of light duty at UPS?

[16] A Yes.

Q When was that?

A Within the first – my first year of being a driver. I'm not sure of what year that was. But during my first year, actually within the first few months of becoming

Q And why did you get light duty then?

A A steel door was accidentally slammed on my left side.

Q Was it a work-related injury?

A Umh-humh. Yes.

Q What work were you given to do then? Is it right that you couldn't drive at the time?

A Yes.

Q And so what work were you given to do? What was your light duty?

A Once I returned I helped gather packages to be readdressed or redirected to a different address.

Q Which arm did you hurt?

A My left side, left arm.

Q And are you right-handed?

A Yes.

[17] Q Did you prepare the address labels?

A During that time, no. I gave the packages – took them to a station and they were addressed by a different clerk.

Q If it was your right arm, why weren't you able to drive?

A It was my left arm.

Q I meant to say that. I misspoke. Excuse me. If it was your left arm and you're right-handed, why couldn't you drive?

A I know my doctor didn't want me to take that chance. You're actually supposed to drive with both –

Q I see.

A – your hands.

Q So you were delivering packages that you could deliver with just your right arm?

A No, not – I was inside the building.

Q And what were you doing – I don't mean delivering packages. But did you actually have to move packages around? Did you use a cart? How did you – I'm trying to picture with your injury how you [18] were able to, to move things around.

A At that time I was a little bit better but not well enough to go on the road. So inside – if it was too heavy, then I let someone else know and they came and got the packages off the truck. I had a weight restriction. I can't remember what it was. It wasn't much, for a package.

Q What do you remember about your weight restriction?

A I would say maybe less than ten pounds, ten pounds or less, something like that.

Q How often did you have to ask somebody else to come move the package for you?

A Not often. During that time of evening its mainly just little, small packages, not really – occasionally a big package, but mainly small packages.

* * *

[27] the one that started in March 2008?

A March.

Q Until the beginning of December 2008, right?

A Umh-humh.

Q And when you came back that time, did anybody tell you to bring a doctor's note?

A Yes. Well, not necessarily. I just knew to.

Q And did you bring a doctor's note that time?

A Yes.

Q And what did your doctor's note say?

A That I could return to full duty.

Q But UPS didn't let you go back to your regular job at that point; is that correct?

A That's correct.

Q Do you understand why that was?

A I was told by the doctor it was UPS policy.

Q You were told by the UPS doctor that it was UPS policy –

A Umh-humh.

Q – that you work inside for some period of time?

[28] A Yes.

Q Did the UPS doctor tell you how long you would be required to work inside?

A I think he might have mentioned two months or three months or so, something like that.

Q But you worked inside for how long until –

A From that first week in December, and I returned – but then the first or second week of March to driving, of March '09.

Q Did you know from the very beginning that it would be for that three-month period of –

A No.

Q – three-month period of time? What did you know in the very beginning about how long you'd be required to work inside?

A Just what the doctor told me.

Q You're talking about the UPS doctor?

A Yes.

Q What did the UPS doctor tell you about how long you'd be required to work inside?

A That it was just a part of UPS policy.

Q But did he not say anything about how long [29] that would last, the requirement that you work inside as opposed to in your air driver job?

A I want to say that he told me the months, the time period, because I knew I had a time – that I would be going back sometime in March.

Q Did you need another doctor's note at the end of that three-month period in March '09? Did you need another doctor's note to go back to your regular air driver job?

A No. During that time period, before returning to the route, I had to go back and see him, the UPS doctor once again, and then he cleared my DOT.

Q So the reason you were working light duty during that period of time had to do with the fact that you'd had a stroke; is that correct?

A Yes. I'm assuming, yeah.

Q When you went to see this UPS driver (sic), was it there on the facility at UPS, or was it somewhere else?

A UPS driver, or doctor?

Q Doctor. When you went do see the UPS doctor –

* * *

[34] MS. GUSTAFSON: That's all. Mr. McGee will have some questions for you.

THE WITNESS: Okay.

MS. GUSTAFSON: And I might have a few after that. We'll see.

THE WITNESS: Okay.

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. McGEE:

Q Miss McNair, when you returned to work initially from the stroke in December of 2008, you were assigned some inside work, correct?

A Yes.

Q And that inside work that you were assigned required you to lift packages weighing over twenty pounds, didn't it?

A Yes.

MS. GUSTAFSON: Objection. Mischaracterization of her prior testimony.

Q And would you estimate that you probably had maybe twenty-five to forty packages a day over twenty-five – twenty pounds –

MS. GUSTAFSON: Objection.

[35] Q – that you had to lift?

MS. GUSTAFSON: Leading question.

A Yes.

MR. McGEE: I don't have any other questions.

EXAMINATION BY COUNSEL
FOR THE PLAINTIFF

BY MS. GUSTAFSON:

Q Miss McNair, I thought you testified earlier that when you returned to work in the beginning of 2008, you returned as a clerk –

A Yes.

Q – is that correct?

A Yes.

Q What work did you do as a clerk?

A Made phone calls on packages that needed to be readdressed.

Q What did you do other than making phone calls?

A That's it.

Q And what packages were these that you were making phone calls on? Would these include envelopes and lightweight packages?

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff, vs. UNITED PARCEL SERVICE, INC., Defendant.	Civil Action No. DKC 08 CV 2586

Baltimore, Maryland
Monday, June 14, 2010

Deposition of:

TAMMY GATTON

called for oral examination by counsel for the Defendant, pursuant to notice, at Jackson Lewis, L.L.P., 2800 Quarry Lake Drive, Suite 200, Baltimore, Maryland, before Sheri C. Stewart, of Esquire Deposition Solutions, a Notary Public in and for the State of Maryland, beginning at 12:55 p.m., when were present on behalf of the respective parties:

* * *

[9] BY MR. McGEE:

had a telephone conversation with Ms. Gustafson.

THE WITNESS:

A Yeah, that day. Yes, sir.

Q You said no. You're now saying yes, I did have a telephone conversation with Ms. Gustafson?

A Yes, I did.

Q Who initiated that telephone conversation?

A I don't remember. I think I did. I don't remember.

Q Okay. Was anybody else involved in that call, or party to that call?

A No, sir.

Q And what did you discuss during that telephone conversation?

A I think I called Mrs. Gustafson because I thought I might have a case against UPS. I was wrongfully terminated, and talked to Peggy's lawyer, and that led up to talking about Peggy.

Q Did you ultimately retain Ms. Gustafson as your attorney?

A No, sir.

[10] Q Has she ever been your personal attorney?

A No, sir.

Q So tell me what you discussed with Ms. Gustafson during this telephone call.

A I told her about my wrongful termination, asked her if she thought she could help me and

represent me. And that led into – told her I knew she was Peggy's attorney, and we talked about that. And then she had asked me some questions about Peggy, and that's all I remember at this time.

Q What questions did she ask you about Peggy Young?

A She asked me if I knew that Peggy had – was not able to work, if I knew she was pregnant, that she couldn't work because of it. What knowledge did I have of the same situation with people working on light duty.

Q And what did you tell her?

A I told her that I knew of a couple people that worked while they were pregnant, [11] including myself, and other reasons, you know, for light duty, that there is no written policy about light duty. It's just whatever supervisors and management want to do, they do.

Q Are you familiar with the temporary alternative work provisions in the Collective Bargaining Agreement?

A Yes, some.

Q Okay. That's a written policy, isn't it?

A It's a union policy.

Q Well, it's an obligation that the company is required to comply with since it's in the –

A Yes, sir.

Q – union contract, correct?

A Yes, sir.

Q Have you only had that one telephone conversation with Ms. Gustafson?

A I believe so. She may have called back to tell me the fax was coming, or did receive it. We talked that day.

[12] Q You mentioned that you were aware of the fact that you and others worked while pregnant.

What other employees are you familiar with that worked while they were pregnant?

A Quatrese Pendleton. Just Quatrese.

Q Have you ever had any communications with Peggy Young about any of the issues involved in her lawsuit?

A Prior to her filing her lawsuit, we talked because she was very upset about being told to go home. And I told her, you know, you can do your job, there's no reason for them to send you home.

Q When did you have that conversation with Peggy Young?

A Right when she was sent home. I don't remember the date.

Q Do you know anything about the circumstances or reasons why Peggy Young stopped working, other than what she has told you?

A No.

[13] Q What did Peggy Young tell you about her situation?

A She told me that they were sending her home.

Q Did she say who?

A No.

Q Did she tell you why?

A Yes.

Q What did she tell you?

A She said because she was pregnant.

Q Did she tell you that she had presented UPS with a doctor's note and requested a light-duty work assignment?

A Yes, sir.

Q Did she tell you what the doctor's note said?

A No.

Q Did Peggy Young tell you anything else about her situation?

A She said that she could work.

Q Did she tell you anything else?

A Not that I recall.

[14] Q Where did this discussion you've just described take place?

A In our warehouse in Landover.

Q In the D.C. Building?

A Yes, sir.

Q What was Peggy Young doing in the D.C. Building that day?

A She just come back from her route, delivery route.

Q She had actually been working that day?

A Yes.

Sir, I remember another, Timberly was pregnant also at work. I don't know her last name.

Q Okay. I want to get – stick for a moment with this conversation that you had with Peggy Young which you claimed took place inside the D.C. Building on a day when she actually was working and delivering packages. Is that what you're telling me?

A She was at the building in uniform.

[15] Q Was anybody else present during your discussion with her?

A I think Cece Richardson was there.

Q Anyone else?

A No, sir.

Q Did you have any communications with Peggy Young about her situation on any other occasion, either before or since then?

A No, sir.

Q Have you had any e-mail communications with Peggy Young?

A No, sir.

Q Have you spoken to anybody else about Peggy Young's situation or any of the issues involved in this lawsuit, other than what you've just described as that one conversation with Peggy Young and the discussion that you had with Ms. Gustafson?

A There was a group of women, UPS drivers, that went to – came in to Baltimore to file an EEOC complaint, and we mentioned Peggy's name, and Peggy was going to file her own [16] statement, so we talked about it to the EEO counselors.

Q Well, who was the group of UPS drivers that you're referring to that came to the EEOC?

A Pat Arline (phonetic), Kim Campbell and myself.

Q And you all came together?

A Yes.

Q Who did you meet with at the EEOC, do you recall?

A Lateisha Brown.

Q Have you spoken to anybody else about Peggy Young's situation or any of the issues involved in Peggy Young's lawsuit?

A No, sir.

Q What was your date of hire by UPS?

A January 16, 1992.

Q What was your date of termination?

A September 22nd, 2008.

Q And prior to the termination of your employment, you were a full-time bargaining unit employee at UPS?

[17] A Yes, sir.

Q And you had what, an Article 22.3 full-time position?

A Yes.

Q And that was a position that you bid on and were awarded based on your seniority with the company?

A Yes.

Q And you worked in the D.C. Building or what's referred to as the D.C. building?

A Yes.

Q And part of your Article 22.3 combination provision involved working as an air driver?

A Yes.

Q And the other part would involve working on the pre-load?

A Yes.

Q Do you have any military background?

A Yes.

Q What is that?

A I have 15 years in the Air Force and

* * *

[21] Q What type of vehicle did Peggy Young drive as part of her service as an air driver at UPS?

A Most of the time, she had a minivan.

Q Do you recall her ever driving any vehicle other than a minivan?

A Yes, we have – we call them bread trucks, they're a little bit smaller than a normal UPS truck, same shape.

Q What do you call them?

A We call them bread trucks.

Q Did Peggy Young ever drive a bread truck?

A Yes.

Q Did she ever drive a bread truck on a regular basis?

A No. Not that I'm aware of.

Q The minivan that Peggy Young typically drove, was that a standard or an automatic transmission?

A Automatic.

Q Did most UPS air drivers drive [22] minivans with automatic transmission?

A About half of them.

Q What did the other half drive?

A The bread trucks are second. It depends on the size of your deliveries. If you just had some letters, you'll take a minivan. If you had large deliveries, you'd take a bread truck.

Q But that varied from day to day?

A Yes, it varies.

Q You said the bread trucks were automatic transmission as well?

A Um-hum, yes.

Q What type of vehicle did you typically drive?

A I had a bread truck.

Q During what period of time?

A On my delivery, since I came back from active duty, I had a bread truck.

Q At any time after August of 2005, did you drive any other type of vehicle?

A Yes.

[23] Q What other type of vehicle did you drive?

A I drove everything on the lot. They have moose trucks, they're big stake body trucks, like several ton truck, regular delivery trucks. I can drive anything on the lot.

Q How is it determined what type of vehicle you or any other air driver would drive on any particular day?

A Most people had vehicles assigned, but if you had – you had to switch up if the vehicles is off the road for maintenance or if you had large deliveries.

Q Did you ever have – after August of 2005, did you ever have assigned to you on a regular basis any vehicle other than the bread truck?

A No, sir.

Q Did you ever ask to be assigned a minivan with automatic transmission, similar to what Peggy Young drove?

A Yes.

[24] Q When did you ask for that?

A When I first got back in 2005.

Q Who did you ask?

A Jim Harris.

Q Was your request granted?

A No.

Q Were you given an explanation why it wasn't granted?

A Yes. Nobody's assigned a vehicle.

Q Pardon?

A He said that nobody is assigned a vehicle.

Q Did you understand what he meant by that?

A Yes, you can't pick and choose your vehicles.

Q Did you request a minivan from anybody else?

A Yes, Dan Brown, Kelly McCreesh (phonetic) and Sean Won (phonetic). I have a lot of trouble driving because my right ankle was broken still. Still healing.

[25] Q Were you ultimately assigned a minivan to drive?

A No.

Q You say you brought some documents with you?

A Yes, sir, I have what your office sent me.

Q Okay. And is one of those the Statement of – titled at the top "Statement of Tammy Gatton"?

A Yes.

Q And is that the statement that Ms. Gustafson prepared for you?

A Yes.

Q Now, let me ask you to focus for a minute on paragraph four of that statement. And it says, I had trouble back in 2004 because I had broken my leg. See that?

A Yes, sir.

Q Were you working for UPS in 2004?

A I don't know.

Q You told me that you didn't return to [26] work at UPS until August of 2005, correct?

A Right.

Q If you didn't return to work at UPS until August of 2005, how could it have been that you were having trouble with your leg at UPS in 2004?

A I may have come back at 2004. Might have my dates wrong. The year wrong.

Q Well, which is wrong, what's written in this statement or what you told us under oath earlier today?

A I don't know.

Q Were you ever given any type of special truck at UPS because of the problem you were having with your leg?

A Sometimes I was.

Q What do you mean by that?

A Well, if I was called off of pre-load to make a delivery, there might be a truck already going out, a minivan that I could take. If they wanted me to go out and do this special delivery, then they tried to accommodate me.

[27] Q But as part of your regular job as an air delivery driver, were you ever given any type of special vehicle?

A Yes, I would think so, yes.

Q What were you given?

A A minivan.

Q When were you given a minivan?

A Occasionally. Before I was assigned the bread truck, you know, we just drove whatever was there.

Q I'm not asking you what you drove; I'm asking you if you were given –

A I guess not, no.

Q You were not given any type of special vehicle?

A No.

Q So what is written here in paragraph four is not true, is it?

A I was given a special platform.

Q We'll get to that, but I'm asking about were you given a special truck?

A It wasn't a special truck. I was [28] given a minivan to drive.

Q On a regular basis?

A No, sir.

Q On what occasions were you given a minivan to drive?

A When it was available for me to use.

Q How often was that?

A Once or twice a week.

Q And was that the same minivan as Peggy Young – same type of minivan as Peggy Young and the other air drivers typically delivered?

A No.

Q What was it?

A Different brand. She goes to the airport in the morning, and they have newer vehicles.

Q So you would drive –

A With lower mileage.

Q So you were driving an older van?

A Yes.

Q And the platform that you refer to in paragraph four, that wasn't something that you [29] were given, that's just something that you took for yourself to use, correct?

A Yes.

Q That's just a box that you used to stand on?

A Yes.

Q And tell me how you used that box.

A Where we stood to scan packages, it was not a level surface, and there was some metal reinforcements onto the platform that were – your foot had to sit at an angle to stand at an angle, with your foot going to, I guess, inward. When I put the box on there, it just gave me a level platform.

Q And you just found the box and used it on your own, correct?

A I found the box – I had found – I found the right particular box that worked and tried to keep ahold of that box, yes. And then when that one got thrown away or something, I'd get another one.

Q And nobody gave it to you, just got it [30] on your own?

A I was allowed to keep it up there.

Q But you got it on your own, right?

A Um-hum, yes.

Q For how long did you work as an air driver, at UPS?

A Probably ten years.

Q Was that always working out of the D.C. Building?

A Yes.

Q What areas did you deliver air packages to?

A Maryland, Virginia and D.C.

Q Did that include the Annapolis area?

A Yes.

Q During what period of time did you deliver packages in the Annapolis area?

A Probably – had a route there when I was just a full-time driver, not an air driver, for about three or four years. And then as an air driver, I would just intermittently, whatever needed to be done.

[31] Q So as an air driver, you would be required to deliver packages wherever a manager asked you to deliver packages, correct?

A Yes.

Q You did not have a bid or a set route that you were entitled to as an air driver, did you?

A Not for Annapolis.

Q And as an air driver, you were required to deliver packages weighing over 20 pounds, weren't you?

A Yes.

Q And you regularly did deliver packages weighing over 20 pounds, didn't you?

A Not regularly.

Q When you say "not regularly," what do you mean by that?

A Usually they were letters.

Q I understand usually they were letters but, you know, you also regularly were required to deliver packages weighing over 20 pounds, weren't you?

[32] MS. GUSTAFSON: Objection. Asked and answered.

BY MR. McGEE:

Q You can answer the question.

A What was it?

Q Well, I'm not disputing that the majority of the packages you were required to deliver were letters, or that weighed less than 20 pounds, but you

also on a regular basis would be required to lift packages weighing over 20 pounds, wouldn't you?

MS. GUSTAFSON: Objection. Asked and answered.

BY MR. McGEE:

Q You have to answer the question.

A Yes, we deliver what we're assigned.

Q You're required to deliver whatever the shippers or customers are shipping next day air, correct?

A As long as they get their package, we make accommodations and get them their packages.

Q All right.

[33] A There's a lot of times I couldn't deliver heavy packages; for instance, when I was pregnant. And we made accommodations for me. And when my leg was hurt, I couldn't do a lot of stuff. And accommodations were made.

Q But generally an air driver regularly has to be able to deliver packages over 20 pounds, correct?

A Generally they're letters, but there is times.

Q And as an air driver, if you have a customer who's shipping a package by one of those premium services that weighs over 20 pounds, it has to be delivered, correct?

A If I have a package that's over 20 pounds when I leave the building, has to be delivered, and we would find a way to deliver it, yes, sir. I had customers help me a lot, too.

Q Customers don't help you when you're in the – you know, loading packages onto the vehicle.

A No, we have people that load for us.

[34] Q When was Quatrese Pendleton pregnant?

A I don't remember. Probably 2006 or '7.

Q Did any supervisor or manager grant her any light-duty work when she was pregnant?

A Yes.

Q Who?

A Bill Riggins and Kelly McCreesh.

Q Specifically what did they do?

A Gave her letters to deliver.

Q What do you mean by that?

A Well, when we're assigned routes and packages to take out, she would get a letter or a couple letters to take out.

Q Well, you regularly delivered letters, too, didn't you?

A Um-hum, yes, sir.

Q And didn't other air drivers also regularly deliver letters?

A Correct.

Q What was different about Quatrese Pendleton's work there?

[35] A If there was heavier packages, she did not take them.

Q How heavy?

A Anything over letter size.

Q And how do you know that?

A Because I saw that.

Q What did you see?

A I saw her given letters.

Q Pardon?

A Given letters to deliver because she was pregnant.

Q How do you know why she was given letters?

A Because I was standing right there.

Q What did you see?

A I saw Bill give her packages, letters to deliver. He said this should be all right for you, right? And she said yes.

Q Okay. Did you ever hear Kelly McCreesh saying anything?

A Yes.

Q What did Kelly McCreesh say?

[36] A Kelly would divvy up the packages, and she said this is Quatrese's pile.

Q That's all she said?

A That I remember specifically, yes.

Q During what period of time did that occur?

A 2007-2006 and '7.

Q Did Quatrese ever present to anybody at UPS any doctor's note or other medical documentation indicating that she had any type of restriction on her ability to work?

A I don't know.

Q Did she ever present any type of documentation indicating that there was a suggested or recommended weight restriction?

A I don't know.

Q At some point did Quatrese Pendleton go out on leave while she was pregnant?

A I don't know.

Q Do you know when she went out on leave?

A No, sir.

* * *

[40] A No.

Q Did any supervisor or manager ever assign one driver's heavier packages to another driver, other than the situation involving Quatrese Pendleton that you mentioned?

A Yes. On my instance.

Q Who did that for you?

A Bill Riggins, Cece Richardson. She wasn't supervisor, but she was assigned packages.

Q CeCe Richardson is a bargaining unit employee, correct?

A Yes, sir.

Q And she was a shop steward?

A She has been.

Q When were you pregnant?

A I guess June 2006.

Q Did you eventually go out on leave in connection with that pregnancy?

A Yes, sir.

Q Was that an unsuccessful pregnancy?

A Yes.

Q When did that pregnancy end?

[41] A August 2006.

Q Other than in your situation, Quatrese Pendleton's situation, are you aware of any other situation in which a supervisor or manager assigned one driver's heavy packages or heavier packages to another driver?

A I'm not aware.

Actually, for instance, if it was too heavy for someone to take and there were two drivers going somewhere together, we would give them the heavier packages. Not for any other medical reason except it needed two people to deliver the package.

Q When you were pregnant, did you present anybody at UPS with a doctor's note or any type of medical documentation with any type of lifting restriction or any other restriction?

A No, sir.

Q Let me refer you to paragraph three of your written statement. States, quote, I was aware that UPS would not let Peggy work while she was pregnant because of some supposed official [42] policy that there is no light duty for pregnancy, period, end quote.

Is that statement based on anything other than what Peggy Young told you?

A No.

Q So the only thing you know about Peggy Young's situation is what she told you, correct?

A Yes. I know Kelly McCreesh had told me that she couldn't work because she was pregnant.

Q When was that?

A I don't know the exact date.

Q Did she mention that Peggy Young had a lifting restriction?

A She said that – no.

Q Did you know that Peggy Young had a lifting restriction?

MS. GUSTAFSON: Objection. Assumes facts not in evidence.

A I may have heard that.

BY MR. McGEE:

Q Did you know that Peggy Young had [43] presented UPS with a doctor's note recommending that she not lift anything over a certain amount of weight?

A I don't know.

Q Other than in the situation involving yourself and the situation involving Quatrese Pendleton, are you aware of any other situation in which an employee has been granted or assigned any type of light duty or alternative work?

A Yes.

Q What other situations are you aware of?

A Anybody that's injured is given some type of light duty.

Q Anybody who's injured on the job?

A I don't know.

Q Are you aware –

A If they have a broken arm or something, you know, they're given light duty, but I don't know where the broken arm came from. I don't know if it's on the job or not.

Q Who with the broken arm was given [44] light duty?

A This guy named Mike that – I was only aware of him because light duty would be the pre-load, perhaps, there's a lot of different positions you could go to for light duty, so he was a regular driver and he came on to the pre-load.

Q Do you know what job he was working on the pre-load?

A Scanning packages.

Q When was that?

A Around Christmas 2007, I think. Brandon Greening (phonetic).

Q Just one second.

Do you know how Mike injured himself?

A No, sir.

Q Are you aware of any other situations where employees were granted light duty or any type of alternative work?

A Specifically when I came back from military duty, I was given light duty. They fashioned a job for me.

[45] Q Any other situations that you're aware of?

A Well, on my statement, Brandon, who was being treated for cancer, and Rick, I can't think of his last name, he came to work on pre-load and the unloading trucks in the afternoon because he did not have his driver's license. But that's not because of an injury, though. But Brandon had light duty because of his cancer treatment.

Q Are you aware of any other employees who were granted light duty or any type of alternative work?

A Specifically not at this time. I remember that it wasn't unusual, though, but I couldn't give you specifics. Wasn't unusual for someone to have some light duty if they had problems.

Q So if it wasn't unusual, tell me what other cases you're aware of.

A Well, that's why I can't give specifics, because it wasn't a – something that [46] really jumps out at you. It's just somebody had a – hurt their back or strained their back or something so they would not have to do something, have a short day or give them lighter packages, maybe just pickups to do, something like that, get someone to help them out.

Q Give me a name. Pat Arline. I can't think of any names because I don't know a lot of people's names. Maybe it will come to me. But there is another guy I specifically remember –

Q You mentioned –

A – had some issues.

Q – a driver by the name of Mike.

Do you know anything about who made a decision to assign him alternative work?

A His supervisor made the decision, but I can't think of his name.

Q How do you know his supervisor made the decision?

A Because he would assign duties to people.

[47] Q My question is, how do you know that it was his supervisor who assigned him to alternative work? Are you just assuming that that was the case?

A I did assume that, yes, sir.

Q Do you know anything about why he was assigned alternative work?

A He had hurt his arm.

Q How do you know that?

A Had a cast on his arm.

Q How do you know that was the reason why?

A I think he told me.

Q Who?

A Mike.

Q You think he did, or he did?

A Yeah, because I wanted to know how to scan, you know, how to do the job.

Q What did he tell you?

A He said, I can't go out on delivery because I hurt my arm. How do you scan?

Q What alternative work were you given?

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[48] A You could go and scan trucks, trucks before they go out for delivery, scan the packages in the trucks, and it's a small hand-held scanner. Basically, that's all you have to do is be able to walk into the truck.

Q When were you given that assignment?

A After – ever since I got back, I was given that assignment. That's a pre-load job.

Q Did you request that assignment?

A Yes.

Q Who did you request it from?

A Jim Harris was one of my supervisors at that time. So I asked him. And there was a pre-load supervisor also whom I asked, but I can't remember his name.

Q But that was part of a regular job on the pre-load, correct?

A Became a regular job. It wasn't, it was just something that – basically we were just becoming automated delivery service, so it just kind of got evolved into a regular thing.

Q But you had already bid on and were [49] entitled to a combination position involving the pre-load, correct?

A I was entitled to that time slot, yeah.

Q On the pre-load?

A Correct.

Q And had you bid on that and been awarded that based on your seniority?

A When I became an air driver, we just created those, so I really didn't even bid on it, we just created those jobs at that time.

Q Did it become a – well, did you go from part time to full time, or were you already a full time –

A I was already full time.

Q Oh, you were already a full-time employee?

A Um-hum.

Q So you already had full-time seniority?

A Yes. It was just back at the beginning, when they just started all that [50] combination jobs and things like that, so.

Q That was under Article 22.3 of the union contract?

A That's what we called them, yes, yes.

Q When you were scanning the packages, did you have to move the packages around?

A No.

Q What alternative work was Pat Arline given?

A She was given light duty, just letter deliveries.

Q Is that when she dropped the package on her foot?

A I don't know if that was the specific time. I don't know.

Q Did she have an injury?

A Yes.

Q What was her injury?

A I don't know.

Q Was it an on-the-job injury?

A I don't know.

Q When did it occur?

[51] A Anytime Pat had an issue, any kind of problems, she was given light, whatever she wanted. Throughout. I've known her for 16 years.

Q She was a shop steward?

A I don't know.

Q Pardon?

A I don't know.

Q Do you know if her injury was an on-the-job injury?

A No, sir.

Q You mentioned an employee by the name of Rick was given some other work. What other work was he given when he had a DUI? What other work was he given?

A He worked on the pre-load. He was regular full-time driver during the day and came in to work on the pre-load, and then he came back in the evening and unloaded trucks.

Q And did the unloading of the trucks involve lifting and moving packages?

A Yes, sir. Wasn't hurt, though, just didn't have a driver's license.

[52] Q And he would be required to lift and move packages weighing over 20 pounds, wouldn't he?

A Yes, sir.

Q And that is a provision in the union contract calling for alternative work for a driver who's disqualified from driving because of a DUI, isn't there?

A Yes, sir.

Q Brandon Greening, in addition to being a driver, was also on the Health and Safety Committee, wasn't he?

A Yes, sir.

Q And that was part of his regular job, wasn't it?

A Yes.

Q What work did he do while he was undergoing chemotherapy?

A He would take out letter deliveries with the air drivers, and that's all I was aware of.

Q During what hours did he do that work?

[53] A 4 a.m. to about noon.

Q During what period of time did he do that?

A He's still doing it as far as I know. I saw him at the hospital recently. And it was during working hours.

Q When was the last time you saw him?

A I saw him a month ago.

Q In a UPS uniform?

A No. He had civilian clothes on.

Q You saw him at the hospital?

A Yes.

Q And did you talk to him about what he was doing?

A Yes. He was in the infusion getting his chemotherapy.

Q And did you discuss anything about what his status was at UPS?

A No.

Q When was the last time you saw him working at UPS?

A In 2008.

[54] Q So did you know anything about what Brandon Greening has been doing since 2008?

A No, sir.

Q Do you know anything about who assigned Brandon Greening work while he was undergoing chemotherapy?

A No, sir.

Q Do you know anything about what, if any, medical documentation he provided?

A No, sir.

Q Do you know anything about the ADA accommodating process?

A No, sir.

Q Do you know anything else at all about his situation?

A Physically, glad to see him. No, don't. He was very sick back then. He told me about his cancer.

Q How do you know what work he was doing while he was undergoing chemotherapy?

A I saw him.

Q Saw him what?

[55] A He came in to work with us in the morning and told me that he was on light duty.

Q For how long did you see him doing that?

A Over six months. He'd go back and forth. He would go out on his route, too, then would come back to pre-load.

Q He would go out on his route as a regular package car driver –

A Yes, sir.

Q – delivering packages?

A Yes.

Q What was your last day of work at UPS?

A September 22nd.

Q What year?

A 2008.

Q In August of 2008, you were caught out on the road pulled over reading a newspaper in your vehicle?

A No. I was observed.

Q You were observed what?

A I was told I was observed reading the [56] paper.

Q Is that true?

A Um-hum, yes, sir.

Q So where were you pulled over?

A I always take my break in the same place, on 15th – 1455 Pennsylvania Avenue.

Q Had you clocked out for a break on your diad?

A Yes.

Q Pardon?

A Yes, sir.

Q Were you discharged by UPS?

A Yes, sir.

Q Why were you discharged?

A I forgot the terminology. Misusing my time.

Q Stealing time?

A Yes, that's it.

Q Did you file a grievance challenging that termination?

A Yes, sir.

Q And did you appeal it all the way up

* * *

[58] 2:08 p.m. until 2:11 p.m.)

MR. McGEE: Ms. Gatton, I don't have any other questions.

THE WITNESS: All right.

MS. GUSTAFSON: I have a few questions for Ms. Gatton.

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MS. GUSTAFSON:

Q How often is it that UPS employees are fired and then taken back to work at UPS?

A How often? It's quite regular. Every time.

Q Had you ever been fired before and taken back to work?

A Yes, I have.

Q Approximately how many other people do you know who were fired by UPS and then taken back to work?

A I would say everybody, 20, 30.

Q It seems like a common occurrence to you?

A Yes.

[59] MR. McGEE: Objection to the form of the question.

BY MS. GUSTAFSON:

Q You testified a moment ago that you were told that if you would drop your EEOC charge you could come back to work at UPS.

Did somebody from UPS tell you that?

A Yes.

Q Who was that?

A Barry Carpenter.

Q Do you know what Barry Carpenter's position with UPS was or is?

A He's the labor guy.

Q And is this the thing that you said you rejected – let me see. I don't want to put words in your mouth.

You said they made an offer of a job back and you did not take it. Is this what you're talking about?

A Yes.

Q So when Mr. Carpenter told you you could come back only if you dropped your EEOC [60] charge, you didn't take that offer?

A Correct. That was done at the Atlantic meeting, it was down in Virginia or North Carolina.

Q When Mr. McGee asked you if you appealed your discharge and if that was upheld, this appeal was something that happened internally at UPS; is that correct?

A Yes.

Q You talked about Brandon Greening being able to – Brandon Greening being accommodated by being able to do air deliveries while he was in chemotherapy.

His regular driver was not as an air driver delivery driver; isn't that right?

A Correct.

Q He was regularly a package driver?

A Correct.

Q And those package drivers regularly deliver heavy packages, heavier packages on average, than air delivery drivers do, don't they?

A Yes.

[61] MR. McGEE: Objection to the form of the question.

BY MS. GUSTAFSON:

Q Mr. McGee asked you earlier what alternative work – what accommodation you were given, and you talked about the fact that at one point when you came back from active duty you were permitted to scan packages and you only had to walk in the truck and scan them.

Was this because of an ankle injury or because of something else?

A Initially, yes, because of an ankle injury.

Q And this was not an injury that had happened on the job at UPS?

A Correct.

Q You testified that there are other people that you remember with issues, whether or not given light duty, but you don't remember their names; is that right? Is that because a lot of the people that you see

and work at UPS you don't know the names of those people?

[62] A Yes.

Q You stated earlier that UPS made accommodations for you when you were pregnant and when your leg was injured.

MR. McGEE: Pardon, I'm sorry?

MS. GUSTAFSON: She stated earlier – she testified earlier that UPS made accommodation both when her leg was injured and when she was pregnant.

MR. McGEE: Objection to the form of the question.

MS. GUSTAFSON: I'll strike that question.

BY MS. GUSTAFSON:

Q Tell me whether it's true that accommodations were made for you at UPS both when you were pregnant and when you had the leg injury?

A Yes.

MR. McGEE: Objection to the form of the question.

BY MS. GUSTAFSON:

Q Okay. I believe I understand the [63] accommodation that was made for the ankle injury, but I want to ask you about that a little bit more.

Your statement says, at paragraph four, I had trouble back in 2004 – and you testified today that may have been 2005, you're not sure about the date – because I had broken my leg, not while I was on duty at UPS, and I had some problems doing my job because of it.

At first I was fired supposedly for failing to follow instructions, but when I complained about it, I was given a special truck and special platform that I could use while my leg healed. This was not an Americans with Disabilities Acts case.

Did you tell me that information that's in paragraph four?

A Yes.

Q Explain what you meant by it.

A When I first got back, I was thrown back into my usual work, and I could not do – I could not drive a truck, I couldn't stand for [64] long, I couldn't stand with my leg at that angle.

It happened over and over again where I was pulled off my scanning position and told to go out and deliver packages and take whatever truck was available and – whether I could drive it or not.

So I was fired because I failed to follow instructions by going out on this truck and hurting myself further.

So I went to the nurse at UPS, and she got me my job back. She gave me the information for Americans with Disabilities so I could – it never got to that point, though. It wasn't – I was given my job back and given special accommodations.

Q Was the nurse Carol Martin?

A Yes.

Q You said you were pulled off of your regular scanning job and told to make deliveries?

A Yes.

Q Did you think that somebody was taking you off your scanning job and making you make [65] deliveries because of your injury? What was the reason for that, if you know?

MR. McGEE: Objection to the form of the question.

A Just needed another person to deliver.

BY MS. GUSTAFSON:

Q But your regular job was scanning at that time?

A Well, scanning for four hours and then deliver for four hours, but there would be morning – earlier deliveries that I made that could be made.

There was two air routes. There was the 8 o'clock route and the 10:30 route, and I just did the 10:30s.

So if they had an 8 o'clock and they needed some more people, they would come pull you off your job.

Q Okay. So at first you said that you were terminated – no, let me see if I can get this straight.

At first I was fired supposedly for failing to follow instructions?

[66] A Right, meaning you're told to go out and do your job. You got to go do it.

Q But when I complained about it, I was given a special truck and a special platform that I could use while my leg healed.

And your complaint was to Carol Martin, the UPS nurse; is that correct?

MR. McGEE: Objection to the form of the question.

BY MS. GUSTAFSON:

Q And your special truck – you testified earlier today about several different sorts of trucks that you drove, sometimes a minivan, sometimes a bread truck, sometimes one size up from a bread truck. Is that what you testified to?

A Yes.

Q Is that correct?

A Yes.

Q And when you were having trouble with your leg, on occasions did they let you drive smaller vehicles? Is that what you meant by a [67] "special truck"?

A That's what I meant by "special."

Q So it wasn't that the truck was somehow special, in that nobody else drove it, it's just that they permitted you on those occasions to drive that smaller vehicle; is that correct?

A Correct.

Q And Mr. McGee asked you today about the special platform. He asked you whether you had found the platform, and you said yes. But you testified that they permitted you to keep it up there.

What did you mean? I'm having trouble picturing. Is this up there on the truck or up there – what do you mean "up there"?

A Up on the – where the trucks back up and the packages come in, there's a platform. And there's – where I was scanning, where I needed that box, the trucks would come out on a conveyor belt. I would stand there and scan the packages, and your foot had to be at an odd angle.

[68] Q Because of the way something was shaped? Why did your foot have to be at an odd angle?

A Because of the platform, the way they built it.

Q The shape of the platform?

A Your leg automatically had to – you had to stand at an odd angle.

Q So you found some kind of special platform that you could put there and use instead of the normal UPS platform; is that correct?

A Yes. It helped keep our foot straight.

Q And your UPS managers and supervisor permitted you to use this special platform; is that correct?

A Yes.

Q You talked about accommodations that were made for you when you were pregnant. Were those accommodations just permitting you to deliver letters rather than packages, or was there something else?

[69] MR. McGEE: Objection to the form of the question.

A Basically letters, yeah. Everything else was pretty – scanning wasn't a heavy job.

BY MS. GUSTAFSON:

Q Okay. Who was your supervisor or manager who made some accommodation for you at that point during the pregnancy?

A Bill Riggins and Kelly McCreesh.

Q You testified that – at one point Mr. McGee asked you something about isn't it true that sometimes air drivers deliver packages over 20 pounds and

they have to be loaded in the truck, and you said we have people that loaded for us at UPS. What did you mean by that?

MR. McGEE: Objection to the form of the question.

A There's loaders. There's loaders and there's delivery people.

BY MS. GUSTAFSON:

Q Oh, I see. So if you had – if you were just delivering letters, you weren't also [70] doing the loading?

A Just depends on what kind of load it was. If it's just letters, we'd sort them on a table, we'd sort them like that.

If it's packages, they'd come on a conveyor or someone would bring them over on a cart to your truck, or they'd be backed up to the conveyor belt to put on your truck.

Q Somebody else would load them for you? You have to answer audibly for the court reporter.

A Yes. I forgot.

Q You were never a regular Annapolis driver?

A Yes, I was.

Q Oh, you were. But this was not as an air driver but when you were a regular full-time driver, correct?

A Correct.

Q So you were never a regular air driver for the Annapolis route, just occasionally did it; is that correct?

A Back in the beginning, I was a pick up [71] driver back in Annapolis, back in –

Q Is a pick up driver somebody who drives in the evening?

A Evening, yes. I did have a route picking up boxes, drop boxes and offices in the evening.

Q But you were never an EAN air driver in the morning on a regular basis?

A Only on case by case, if needed me. Because I knew the area.

Q Forgive me and just tell me if I've already asked you this, I can't remember.

You talked about that special platform that you were allowed to use for scanning when your leg was injured.

A Yes.

Q Do you remember – maybe I already asked you this – who your supervisors and managers were that permitted you to use that special platform?

A You didn't ask me, but I can't remember. I can't remember who he was.

[72] Q It was a man?

A Yes.

Q How long a period of time did you need to use the special platform?

A All the way up until 2008.

Q How sure are you about what Peggy Young was wearing on the occasion when she told you that UPS would not let her work because she was pregnant?

A I remember talking to her.

Q Is it possible you were –

A It was around the truck.

MR. McGEE: Objection to the form of the question.

A It's around the truck, so I assumed – I just thought it might have been her.

BY MS. GUSTAFSON:

Q Is it possible you were mistaken about whether she had her uniform on that day? You don't really remember what she was wearing for sure, do you?

MR. McGEE: Objection to the form of [73] the question.

A It's possible I don't remember what she had on. I remember standing around the UPS truck talking.

BY MS. GUSTAFSON:

Q Do you remember that she had been out on leave for a while because she was trying to get pregnant through IVF?

MR. McGEE: Objection to the form of the question.

A No.

BY MS. GUSTAFSON:

Q You don't remember those details?

A No.

Q Okay.

A She worked, she went to the airport. She was a different – EAN driver, though, was the regular air driver, so she – by the time she would leave from the airport to go do deliveries, so I didn't see her a lot.

Q Okay.

MS. GUSTAFSON: No further questions.

[74] A Except when we got back to the building, but I didn't see her going out.

FURTHER EXAMINATION BY COUNSEL FOR DEFENDANT

BY MR. McGEE:

Q Ms. Gatton, this thing that Ms. Gustafson has referred to as the "special platform" was just a box?

A Yes, sir.

Q What kind of box?

A It was approximately five inches high, and it would take me over the lip of that railing that made me bang my foot in. So it would sit inside that area so my foot could be straight instead of turn.

Q What was the box made out of?

A Cardboard box and had tape inside, our scanning tape.

Q So you stood on top of a cardboard box?

A Had my foot sit on it, yes, sir.

Q That was able to support your weight?

A No. I just had my foot on it. I [75] didn't use it to support my weight.

Q Where did you find the cardboard box?

A We use them regularly because that's where our tape is for the scanning. So it had to be full of tape so it wouldn't get crushed.

So I would just take a full box and put it there and write on it, "Do not move, do not take this, Tammy's box," you know.

Q Customers are not allowed on UPS vehicles, are they?

A Generally you can't have a passenger.

Q A customer is not allowed to come inside a UPS vehicle to grab a package, are they?

A They can come in and help you, yes.

Q Inside a UPS vehicle?

A Sure.

MR. McGEE: No further questions.

(Signature having not been waived, the deposition of TAMMY GATTON concluded at 2:29 p.m.)

* * *

ACKNOWLEDGEMENT OF DEPONENT

I, TAMMY GATTON, do hereby acknowledge I have read and examined the foregoing pages of testimony, and the same is a true, correct and complete transcription of the testimony given by me, and any changes or corrections, if any, appear in the attached errata sheet signed by me.

_____ _____

Date TAMMY GATTON

CERTIFICATE OF NOTARY PUBLIC

I, SHERI C. STEWART, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stereotypy and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

SHERI C. STEWART
Notary Public in and for the
State of Maryland

My commission expires:
December 30, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG	:	
Plaintiff	:	
v.	:	Civil Action
UNITED PARCEL SERVICE, INC.	:	No. DKC 08 CV 2586
Defendant	:	

Deposition of PATRICIA ARLINE-YOUNG

Greenbelt, Maryland

Wednesday, June 30, 2010

12:06 p.m.

* * *

[5] PROCEEDINGS

PATRICIA ARLINE-YOUNG

having been duly sworn, testified as follows:

EXAMINATION BY
COUNSEL FOR THE DEFENDANT

BY MR. McGEE:

Q I guess it's still good morning.

A Umh-humh.

MS. GUSTAFSON: It's afternoon barely.

MR. McGEE: Is it? Okay. Barely.

BY MR. McGEE:

Q Miss Young, my name is Emmett McGee. I'm an attorney with the law firm named Jackson Lewis and I represent United Parcel Service –

A Umh-humh.

Q – in a lawsuit that has been filed against UPS by Peggy Young. In this lawsuit Peggy Young is claiming, among other things, that she was discriminated against based on her race because she was white and she claims that UPS treats African-American employees better than it treats white employees. So I'm going to be asking you some questions today as they relate to Miss Young's, Peggy [6] Young's claims.

If at any time you don't understand a question or would like me to repeat it, just speak up and let me know and I'll be happy to accommodate you.

A I do have – I do have one question –

Q Sure.

A – that I'd like to be part of the record.

As you know, I'm a shop steward. I'm sure you have some background information on me as far as my position at UPS. As well as a full time air driver and an African-American female, basically the company that you represent is known to retaliate against shop stewards, those who advocate for others or try to

uphold the contract, and I would like to know if your firm can assure me that no further retaliation, whether my testimony helps you or Peggy Young, will be acted out against me.

Q Well, I mean, I am not at UPS, but I'm at a law firm. But I do know that UPS does not retaliate against employees or, you know –

A So that's your stance.

Q – for union –

[7] A That's your stance.

Q – activities –

A Okay.

Q – or for, you know, statements that they give or testimony –

A Okay.

Q – that they give.

A Well, I, I agree to disagree with you.

Q Okay.

A And so I take it that you can't assure me. But we can proceed on.

Q I mean, I think you can ask UPS, but I'm –

A No.

Q – certain that you will not be retaliated against in any way.

A Okay.

MS. GUSTAFSON: Can I – you might want to say the thing about not talking at the same time he does because of the record.

THE WITNESS: Okay.

MS. GUSTAFSON: The court reporter I think has trouble when you both talk at once.

* * *

[13] second draft.

Q Where is the first draft?

A I don't know.

Q How did you receive the first draft?

A By mail.

Q How did you receive the second draft?

A By mail.

Q Describe your job as an air driver, please.

A My job has been modified and transformed into many different types of duties. When I first became a full time air driver before 9/11 I was an international driver whereby I mostly catered to the international community such as embassies, processing international packages, taking them to the airport, picking up packages from the airport, doing customs, giving training on customs, so forth and so on.

After 9/11, my job transformed into delivery of EAMs and next-day air delivery. And my shift was from – changed from – I think my old shift was like from seven in the morning to like two-thirty, and my new shift was from four-thirty to – I guess it was much later than that, so probably like three-thirty, [14] and then my new shift was from four-thirty to one-thirty.

Q Four-thirty a.m.?

A Umh-humh. To one-thirty. Because I also do – did the shuttle to the airport, BWI. I did that for a long period of time.

Q And tell me what, exactly what you do as an air driver, or what an air driver does.

A What an air driver is supposed to do under Article 40 is anything to do with time-sensitive packages, deliver them, pick them up. And basically that's it, to deliver them and pick them up, try to – sometime you're used as a customer service rep trying to expand the business.

Q What types of packages does an air driver deliver and pick up?

A Basically time-sensitive packages such as EAM letters, next-day air letters. We do a lot of business with our EAM service with law firms. We do a large EAM service of delivery of pretty much lightweight packages. Sometimes certain areas, if they're doing something like at the Convention Center [15] handlers,

are in the bargaining unit represented by the Teamsters union, correct?

A Yes.

Q And the terms and conditions of their employment are governed by the Collective Bargaining Agreement?

A Hopefully.

Q That's the way it's supposed to work, right?

A Right. But it doesn't work that way. But hopefully.

Q And under the Collective Bargaining Agreement generally positions are awarded based on seniority?

A Supposed to be.

Q And typically if there's an open position there's a bid list that is posted and it's awarded to the person with the most seniority?

A Supposed to be.

Q And full-time employees have greater rights than part-time employees?

A Supposed to be.

Q As an air driver, what type of vehicle do [17] you drive?

A Most of the air drivers drive vans. I'm a full time air driver with a shuttle to my job, so I drive a

500. But other air – mostly all the – I would say ninety-nine percent of the part time air drivers drive a van.

Q And UPS requires all drivers, including air drivers, to be able to lift up to seventy pounds?

A Yes.

Q Do you know what the –

A Actually, the weight went up. It's one-fifty now. The premise is that you're to get help if a package is seventy pounds or over, you are to get help.

Q Do you know what the process is for promotion to a supervisor or management position at UPS?

A Pretty much, yes.

Q And how do you know that?

A Because I've been friends – I've been with the company for twenty-two years. I have a lot of friends that were and are supervisors, where I've

* * *

[29] Q In any case, something extracted –

A I can tell you what it was not. It was not an EAM package because I was on the inside.

Q But it was something that was going to be delivered by an air driver?

A Or a ground driver. Ground drivers, according to my manager Steve Ducua, deliver second-day air

packages and saver packages, which is a later time in the day.

Q And air drivers deliver those same packages, correct?

A Not according to him.

Q Well, tell me what the reality is.

A The reality under Article 40 is that air drivers are supposed to deliver all times the packages.

Q And that would include second-day air, correct?

A Correct. But they don't.

Q Are you saying that no air drivers deliver any second-day air packages?

A Well, I'm a full time air driver and he [30] didn't want me delivering them, so I would venture to say that that policy that applied to me applied to all the air drivers.

Q But you don't know that, do you?

A Well, we're going on the premise that everything is fair and just and by the rules, so I'm assuming that when he stated that those packages can be delivered by his ground drivers, then no air – full time air drivers are touching second-day and late saver packages.

Q Okay. Do you ever touch a second-day air package?

A Never. I've been moved.

Q When did that occur?

A When was I moved?

Q Yes.

A Eighteen months ago.

Q And, again, referring to Paragraph 22 of your statement, what TAW assignment were you given for that on-the-job injury?

A At first I was just sitting in the office answering phones and doing some typing for my then [31] immediate supervisor Kelley McCresh. And then maybe closer to the end of the month, because you can only be on TAW like thirty or so many odd days, it's a time limit that you can only be on light duty, they gave me a scanner and they wanted me to scan packages on the belt.

Q Did you do that?

A Yes.

Q And what did that involve?

A Scanning packages with a hand scanner, with a handheld scanner.

Q And you had to sometimes move the packages –

A No –

Q – correct?

A – I didn't move them. My foot was still hurting. I didn't move anything.

Q What happened –

A They just had to line it up and all I had to do was just go on the truck and just scan it. They were already on the truck.

Q What if the label wasn't up?

[32] A Well, I was doing a sample, so basically didn't have to scan the entire truck.

Q Now, other people that do scanning, they do have to move packages around, sometimes flip them to put the labels up, correct?

A I don't know. That was the first time I had been exposed to it. So when I was on the belt no one was on the belt with me. But basically from my understanding, it's a sample scanning of a few packages on the truck to match those packages up with that truck for the past system. So if you don't want to move – if you don't want to scan a heavy package or if you don't want to move a heavy package around you don't have to because you have hundreds of packages to choose from of a lighter weight or more convenient for you to manipulate. So it's a sample thing; it's not like you're scanning the entire truck.

Q Don't all packages have to be scanned?

A They're – that's a past system. That's a completely different thing.

Q But all packages have to be scanned, correct?

[33] A Scanned when they're being delivered, yes.

Q And what about when they're in the facility? Don't they have to be scanned when they're in the facility so they can track and know where the package is at any given time?

A I know what it is. An automatic pass label is made and then they put the pass label on the package.

Q And then they scan it?

A I don't even know if our facility's scans can really track all the package's from – scan – in other words what I'm saying to you is I don't believe every package on every truck is scanned to that truck.

Q But it's scanned at some point in the facility, correct?

A That I can't be sure of.

Q Do you know anybody who has as their regular job a scanning function?

A I'm sure someone does it, yeah. Sometimes the supervisor does it.

Q Do you know anybody, any bargaining unit employee who has as their regular job scanning?

[34] A As I stated, I haven't been on the day shift in a little over eighteen months, so – but I do

recall when I came back from the airport seeing non-management personnel with scanners scanning packages, I have seen that visibly. Do I know them by name? No.

Q And do you know whether those – what other functions or responsibilities those individuals had beyond scanning?

A No. A lot – a lot of the – a lot of the early morning staffing, it's a lot like a clerk/technician type function where they're doing a lot of inputting. I think it's called Datacap, where they're doing a lot of inputting into the computer. So they may not be handling like really heavy packages or, or packages that much at all.

Q But you don't know, do you?

A I don't know what?

Q You don't know what their job involves, do you?

A I am familiar with Datacap, and Datacap is just standing at the computer, almost like a data [35] entry person. So I do know about that one.

Q What is – is there any – does anybody have a job that involves just that?

A I don't know if it just entails that, no.

Q Generally, bargaining unit employees at UPS are required to work as instructed?

A Yes.

Q And that means that you can be – if you're an inside employee you can be required and asked to do any, any function in the – inside function that's bargaining unit work?

A Under that classification. And it has – see, every job is under classification, and parts of the contract cover that classification. Just like my job is under Article 40. So if I'm asked – if I'm in the building due to a late plane and I'm asked to go load up a trailer, I don't have to go load up a trailer.

Q What's the classification of the employees who you claim sometimes as part of their job at least did some scanning? What classification is that?

A I would say clerk, clerical.

[36] Q Is there any clerical classification?

A Yes.

Q Is there any clerical classification under the Collective Bargaining Agreement?

A Should be, yes. The clerk, address correction clerks.

Q I'm going to hand you the Collective Bargaining Agreement, and show me where that is.

MS. GUSTAFSON: If you know. If you don't, you can say that?

A It's not a problem. I mean, I used to do it, so it should be

The union employee – so it should be something addressing it, maybe in the addendum.

(Witness reviewing document.)

A It says part time clerical positions included in the bargaining unit as of July 31st, '02, will be paid the preloader/sorter rate of pay. So it does reference clerical positions. Page 253.

Q Do you know anybody who has a clerical position?

A The morning staff that does the address [37] corrections for – as a matter of fact, they have a clerical staff in the p.m. as well as in the a.m.

Q Do you know the name of anybody who does that job?

A No. I don't – I don't recall their name.

Q And as part of that job they have to be able to lift and move packages so they can see the information on the package, correct?

A Yes. It comes – well, it comes out on a slide, so the drivers bring the packages over to them. So it's on a slide.

Q And then they have to move and lift the packages so they can see the information on the –

A Or they can get –

Q – address labels?

A – someone else to do it or – I mean, they don't have to.

Q Well, how does it get done if they don't –

A When I used to do it –

Q – do it?

A When I did it as a clerk I had someone – if the package was heavy I had someone help me put it on [38] the cart.

Q So the address correction clerks have to either by themselves or with assistance from somebody be able to lift and move packages, including heavy packages?

A Right.

Q And when you were an address correction clerk, if it was a thirty-pound package, is that something you would handle –

A When –

Q – on your own?

A When I was an address correction clerk the weight was forty pounds.

Q Okay. And were you able to handle that on your own?

A Yes.

Q And as an address correction clerk would you have to then take the packages and put them back on the belt?

A No.

Q What would you do with the packages?

A I'd put them on a cart.

[39] Q On a cart?

A Yeah. I don't recall ever putting packages back on the belt.

Q And you would take them from where to put them on the cart?

A I would roll the cart over and maybe someone from local sort or preload would put them on the belt. But I wouldn't put them on the belt.

Q I'm saying you had them there on a counter?

A It come down on a slide.

Q Okay. On a slide. And then you would pick them off the slide and put them on the cart?

A Yes. I'm trying to think. This is years ago when I was an address correction clerk. But I don't recall ever handling any really – but like I said, the weight was forty pounds. So I don't recall ever handling any heavy packages.

Q Heavy meaning over forty?

A Heavy, heavy meaning over forty pounds, correct.

Q And whether an employee is granted light duty or TAW is governed by the Collective Bargaining [40] Agreement, isn't it?

A It's a bipartisan effort. You can say it's governed, but it's also leeway given to the discretion of management. Perfect example: A manager can say I have no light duty work for you. Whether it's in the bargaining agreement doesn't matter at that point, if management says I have nothing for you.

Q Are you aware of any employees who presented a doctor's note that included a lifting restriction other than Peggy Young?

A A specified lifting – yeah. Quatrise Pendleton. Who else do I recall? She had – she had almost the same scenario but she worked for a while. I was her shop steward. Well, I didn't do a grievance for her, but I was there and I spoke on her behalf. So they worked her for quite awhile.

And that's the only one I can directly recall that actually had a light – that I saw, I saw her doctor's note.

Q Whether you saw it or not, do you – are you aware of any other situations where you believe that an employee presented a doctor's note with a lifting [41] restriction for some reason other than an on-the-job injury?

A Well, when I was at the BWI facility there – I mean, we used to joke about something in the water.

(Telephone interruption.)

THE WITNESS: I do apologize.

Can you repeat the question?

MR. McGEE: Well, I'll ask you the question.

BY MR. McGEE:

Q Other than Peggy Young and I think you mentioned Quatrise Pendleton, are you aware of any other employee who presented a doctor's note with a lifting restriction for some reason other than an on-the-job injury?

A No, not presenting a light – a doctor's note. No.

Q You were saying something about the airport?

A Well, what I was saying was, the joke was when I was doing the airport was something was in the water because it was like at least three women there that were pregnant. And whether they presented a [42] light duty notice from their doctor, I have no idea. But I do know that the job that at least one of them was doing, they were no longer doing it anymore.

Q Who was that?

A I want to say it was Dawn, and I don't recall Dawn's last name.

Q Dawn Myers?

A Yeah.

Q What was her, her regular job?

A Well, she, she did different functions at the airport that required having – sometimes she would help offload the plane, which was – you know, that was everything coming down off the plane, which the packages could be quite heavy, bags or what have you, and sometimes she would help with that. She's been known to climb up the ramp and offload the plane and push, push everything down. She worked in another capacity, and I don't know exactly what it was, but it was like lifting and pulling. And then she became full – when she began to show she would do escort, you know, escort the feeder drivers or drivers. I had a license so I didn't need to be escorted in. But [43] escort the feeder drivers in, so you're just driving a little small, kind of like a postal carrier truck almost. And before that she used to – I used to see her driving around, pulling like a train pulley around the airport, pulling the containers, driving the containers off and then offload the containers.

Q So are you saying you believe that she was accommodated in some way, her pregnancy was –

A Sure.

Q – accommodated in some way?

A Umh-humh. And it was also mentioned to me by the other young lady who was pregnant, but she didn't ask – I don't believe she – I know she didn't have a light duty notice, but she offloaded that plane all the way up to probably her, close to her ninth month or the end of her eighth month. But she always vented to me because she knew I was a shop steward that she felt that Dawn was receiving preferential treatment in regards to her pregnancy and she was not.

Q Was that second employee Lauren Faley?

A I believe that was Lauren. It was two. Like I said, it was three pregnant altogether.

[44] Q And Lauren Faley, you say she continued to do her regular job –

A Umh-humh.

Q – while she was pregnant?

A Umh-humh.

Q You need to give an audible response.

A Yes. I'm sorry. I am so sorry.

Q And did you say that you know that Lauren Faley never submitted any type of doctor's note with a restriction?

A I believe she did not. She never mentioned it to me.

Q Are both Dawn Myers and Lauren Faley white?

A Yes.

Q So at least as long as they did not bring in a doctor's note saying that they had some type of lifting restriction or otherwise couldn't do some part of their job, generally pregnant employees were allowed to continue working during their pregnancy?

A Yes.

Q Now, I'm going to direct your attention to Paragraph 12 of your statement, where you say it's not [45] unusual for certain deliveries to be reassigned for awhile if a particular driver has a problem of some sort.

A Umh-humh, yes.

Q Can you identify for me any, any instance in which that happened?

A It happened with – I know firsthand it happened with Tynette Williams. It happened, as I stated, with Quatrise Pendleton. Oh. And it also happened with Sparkle Tyree.

Q Were there any other situations other than those three where certain deliveries were reassigned while a driver – for a while if a driver had a particular problem of some sort, other than the three instances you mentioned, Tynette Williams, Quatrise Pendleton and Sparkle Tyree?

A Is this question only involving women who were pregnant, or women – or people in general?

Q Well, it's not limited to employees who were pregnant. I'm referring to your statement –

A Okay. Right.

Q – in Paragraph 12 –

[46] A Sure.

Q – that it was not unusual for certain deliveries to be reassigned for a while if a particular driver has a problem of some sort. And I'm asking you if there were any other instances in which that happened other than the three that you mentioned.

A I'm, I'm certain on days when I didn't feel well I was accommodated, for, you know, various reasons I was accommodated and given a lighter load to start off the day with.

Q Are there any other instances or cases or employees with respect to which that happened?

A I can only speak within my work environment.

Q Are there any other cases that you're aware of?

A Those are – those are the cases that are the forefront of my mind that I know right off the top of my head. But this is – this one qualify for under 12, as far as people just generally getting sick and

accommodated light duty because they didn't go out on the road. So your, your question is pertaining to basically people who were accommodated who went out on [47] the road and just had a lighter workload. Yes?

Q Well, I'm asking you to tell me what you mean when you say –

A That's what I meant. That's what I meant. I just meant those who actually went out on the road but had a lighter workload due to they didn't feel well or they were pregnant or what have you. That did not include those who had other illnesses going on unrelated to work but were given modified work schedules or light duty to accommodate them.

Q Right now I'm just asking you about –

A Right.

Q – the cases –

A The 12. So I understand.

Q – where –

A Right.

Q – certain deliveries –

A But that's –

Q – were reassigned. So it's the four cases, Tynette Williams, Quatrise Pendleton, Sparkle Tyree, and yourself?

A Yes.

[48] Q And tell me about your personal experience in that regard.

A Well, if I'm not feeling well but I want to work, it was nothing for me – for someone to exchange 'work with me or I could do their area, they could do my-area, if I, if I go to my supervisor. Normally this would be handled by the immediate supervisor, not the manager. And at that time Bill Riggins was my immediate supervisor and he had no problem with it as long as the work – as long as the customer was taken care of. Because at the end of the day it's not who has what heavy package or who has what light package, it's how we serve the customer. No one is ever locked into just one zip area or one area unless, you know, like it's far off, like Annapolis or Bowie where it's a lot of driving involved, and that – those drivers don't have a meet point. But other than those particular drivers, everybody else had a meet point.

Q A meet point is where you –

A Downtown.

Q – meet a –

A Right.

[49] Q – you meet a regular package driver and take packages off his or her vehicle and help deliver them?

A Yes.

Q Now, in the cases involving you where you claim that your co-workers helped you out, in any of those instances did you ever present a doctor's note with a lifting restriction or any other type of restriction on your ability to work?

A No.

MR. McGEE: And let me just say again, we can take a break at any time. If you want to take a break –

MS. GUSTAFSON: If you want a break –

MR. McGEE: – it could be a two –

MS. GUSTAFSON: – you can have –

MR. McGEE: – minute break –

MS. GUSTAFSON: – a break. I'll just –

MR. McGEE: – a three-minute break or a five-minute break. So just speak up.

THE WITNESS: I have no problem speaking up. I just want to be able to get to work. So –

[50] MR. McGEE: I understand.

MS. GUSTAFSON: Would you just give me thirty seconds to get some water?

MR. McGEE: Yes.

(Discussion off the record.)

BY MR. McGEE:

Q Miss Young, I want to refer you to Paragraph 13 of your written statement relating to Tynette Williams. Did Tynette Williams present a doctor's note with any type of lifting restriction or any other restriction on her ability to work?

A No, not that I'm aware of.

Q And when you say in Paragraph 13 that other drivers took heavy packages, what are you referring to by that? What heavy packages, or what type of heavy packages?

A Well, Tynette used to also do the shuttle with me. She was one of the shuttle drivers that went to the BWI facility in the morning.

Q Umh-humh.

A So myself, Kim, Kim Smith would make sure that we took the heavier loads so she wouldn't have to [51] lift any heavy, heavy packages and pull them off the belt. And then when we got back to the building to do the dispatch and also be a part of that dispatch, we made sure that she didn't have twenty seventy-pound packages to deliver. We made sure that she was accommodated, and our supervisor was completely aware of everything that we were doing. But as I stated before, at the end of the day it's not who does what, but the customer.

Q Did any supervisor or manager instruct you to take the heavier pages from Tynette Williams?

A They did not instruct us, but they gave us the clear go-ahead.

Q But it's something that you volunteered to do?

A Yes.

Q And when you say you were given the clear go-ahead what was said to you about that?

A Something to the effect that's fine, you know, whatever you all do is fine as long as, you know, everything is done on a timely manner.

Q Who said that to you?

[52] A I believe Bill Riggins said that. And I would even – Kelley McCresh was also the supervisor after Bill left. I'm not sure of my timeline, but I'm sure it was fine with Kelley as well.

Q Well, I don't want you to assume anything. Did Kelley McCresh ever say that she was aware of this and condoned this practice?

A If you are a supervisor over a small operation, how could you not be aware?

Q I understand that. I'm not asking you whether she was aware. I'm asking you did she ever say anything about it?

A She never said not to.

Q Did you have any discussions with Kelley McCresh about that practice at all?

A No, because it was not an issue. I only had discussions when it became an issue, and it only became an issue when someone actually was trying to pass a light duty notice to the supervisor. And it even – wasn't even an issue with the immediate supervisor because they knew their staff and they knew that they could get it done. It's basically upper [53] management that, for whatever reason, wanted a zero tolerance of that.

Q So upper management, if they became aware that an employee had submitted a doctor's note with a lifting restriction for anything other than an on-the-job injury, upper management would say we're not going to allow that, if you can't do your job, you're going to have to go out?

A That's not entirely correct. Because when you get sick and can't obtain your DOT card, you're accommodated light duty. So it's kind of a gray area.

Q I'm talk – let's, let's – I'm not talking about – let's –

A Well, you said –

Q Fair enough.

A You said –

MS. GUSTAFSON: Let her answer the question, please.

A But what I'm saying is what I heard in your question was anything other than an on-the-job

injury. So that made me reference health issues that were not an on-the-job injury.

[54] Q Okay.

A So that's why I couldn't respond.

Q Okay. So let me then qualify the question.

A Umh-humh, yes.

Q If management became aware that an employee had submitted a doctor's note with a lifting restriction or some other restriction that was not the result of either an on-the-job injury or the case where an employee failed the DEO – the DOT physical and was unqualified to drive, management would not allow an accommodation of any type of light duty restriction if they became aware of it?

A I cannot say that with certainty, no.

Q Was that your experience there? I mean, you were saying when management became – you know, it was okay with the supervisor but when managers became aware of it upper management became aware of it, it was a different situation. What did you mean by that?

A What I meant – and let me qualify my statement. What I meant was when it was a light duty request for a pregnant individual, management intervened for a pregnant individual, management intervened and had a zero tolerance. But anything [55] else it appeared to be a case-by-case basis.

Q Okay. Are you aware of any case where management was aware of an employee submitting a light duty request or a lifting restriction where management accommodated that?

A Yes. Brandon –

Q That was not a case where the driver was unqualified, medically unqualified to drive or a case involving an on-the-job injury?

A I'm thinking. No, I can't think of anything.

Q In Paragraph 14 of your statement you refer to Sparkle Tyree.

A Yes.

Q Did anybody in management ever instruct any other employees to take Sparkle Tyree's heavier packages?

A Being as though that was four years ago, even longer now, we're talking five years, I think her child is about five years old, I cannot emphatically say someone take her work. What I can emphatically say is there was full knowledge that she was being [56] accommodated, so there was an exchange of if she had something heavy in her zip area that she was delivering that day, that they would – because you have more than one driver in that same zip area, that the exchange was being made or accommodations were being made, and I can emphatically say whoever our supervisor was during that time period was fine with it.

Q At the time that other, you claim other drivers were taking Sparkle Tyree's heavier packages, had she presented to management a doctor's note with any restrictions?

A What I believe happened was she may have came in with a light – yeah, she came in with a light duty notice later, and that was her disqualifier, so to speak.

Q So once she presented with a doctor's note with some type of light duty request or –

A She went out on disability.

Q And I refer you to Paragraph 16 of your statement involving Quatrise Pendleton. Is this one of those situations where when upper management became [57] aware that she had a lifting restriction, that she was not accommodated and then required to go out on leave?

A Yes. I remember this very well because I – she gave me the light duty note and I showed it to Bill, and then I showed him the article that we somewhat disagree on, and he said, fine, Pat. And then she worked and she worked, and then somehow he came back to me and he said, you know, it's out of my hands, they won't let me work her anymore.

Q And "they" being upper management?

A Yes.

Q And that's because she had presented a doctor's note with a lifting restriction?

A Yes.

Q Is that what you understood?

A Umh-humh.

Q At some point did Quatrise Pendleton change the vehicle that she was driving?

A Change it from what?

Q Was there any change in the vehicle that she drove at some time?

A Most – all the drivers that we mentioned [58] always drove the van.

Q What type of vehicle did Peggy Young drive?

A A van.

Q What type of vehicle did Quatrise Pendleton drive?

A I believe a van.

Q Was there any difference between the vehicle that Quatrise Pendleton drove and the vehicle that Peggy Young drove?

A We only had one type of UPS van.

Q So was there any difference between the vehicle that Peggy Young drove and the vehicle that Quatrise Pendleton drove?

A No. Peggy drove a van as well.

Q Did Cici Richardson ever take heavier packages for the air driver Otis Coates?

A Did she – say that again.

Q Did Peggy – excuse me. Did Cici Richardson ever help out air driver Otis Coates by taking and delivering his heavier packages, to your knowledge?

A To my knowledge, I don't know. It could be – I know I've accommodated Otis Coates.

[59] Q In what way?

A When he was feeling sick. I mean, this was years ago. But he was feeling really sick and I took over a lot of his workload, which was commonplace when you know another fellow driver is not feeling well. I've done it for Otis, but I don't know if Cici's done it for Otis.

Q And you voluntarily did that on your own –

A Yes.

Q – correct? Nobody instructed you to do it –

A No.

Q – did they?

A This is a job where you perform a lot of your duties on your own. You work independently and you make independent decisions under the guides and policies of UPS as well as the contract.

Q I want to refer to you Paragraph 23 of your statement involving Brandon Greening. Part of Brandon Greening's regular job was serving as a member of the safety committee –

A Correct.

[60] Q – wasn't it?

A Yes.

Q So when he was on chemotherapy he was just performing that portion of his regular job as a member of the safety committee, correct?

A No.

Q Well, what was he doing in the office?

A He was assisting Terri in whatever duties she could find him, but she had an assistant. When you're on the safety committee that's not an everyday, five-day-a-week job. Safety committee is we're having a special presentation, we're having special training, we need to be training hazmat training, we need to do this. But that's never been a – he never did his safety work in the morning and then went on road for delivery. So, no, that was a volunteer.

Q How do you know what he was actually doing when he was working in the office – inside?

A Because he was in my office sitting beside Terri every morning when I walked in, and he was at the computer.

Q And how long were you in the building, [61] inside the building?

A When I came back from the airport, no more than fifteen, twenty minutes.

Q Okay. So you were – how do you know what Brandon Greening was doing other than during those fifteen minutes when you were inside the building?

A Well, I knew Brandon Greening's route, and what I did know, he was no longer on his route delivering. So he was in the building sitting down and he was very sick. So when you're under chemo and you've lost ninety percent of your hair and about seventy percent of your strength, you can't do much but sit down.

Q So during that period of time he was not able to drive?

A He was not able to drive, correct.

Q And my question is how do you know what he was doing inside the building except during those fifteen minutes when you were inside the building? In other words, how do you know what he was doing when you were out on the road delivering?

A Well, I knew he was performing a light duty [62] function.

Q How do you know that?

A Because that's all he could do.

Q Well, do you know what he was actually doing?

A Do I know his specific job function? I only know what I saw, him sitting at the computer typing.

Q During those fifteen minutes?

A That I – that I walked in and walked out, yes.

Q Do you know what hours he worked while he was undergoing –

A I saw him every morning.

Q Okay. Do you know what hours he worked –

A No.

Q while he was undergoing chemotherapy?

A No.

Q He was a full time – before he got sick he was a full-time employee, correct?

A Correct.

Q When he was sick and undergoing chemotherapy, do you know how many hours he worked?

[63] A He had to work enough hours to keep his medical, his medical coverage.

Q Well, part time employees get medical coverage, right?

A He wasn't classified as part time. When you're classified as full time you have a different

amount of hours that you have to keep up quarterly versus your part time employees.

Q How many hours was that for a full time employee?

A You have to do at least thirty hours a week.

Q Do you know if he actually did that?

A No, I don't.

Q When he then hurt his shoulder, he went out on leave, correct?

A He went out on disability.

Q He wasn't given light duty when he hurt his shoulder, was he?

A No.

Q Let me refer to you Paragraph 25 of your statement involving Charles Cox.

A Umh-humh.

[64] Q Charles Cox was a full time employee, correct?

A Yes.

Q A full time combo employee which means he basically had two part-time jobs; is that correct?

A Correct.

Q And the second half of his regular job was sorting packages inside?

A No, it's the first half. The first half was sorting preload and then his second half was delivery. And depending on what was going on in the building, sometimes, ninety-nine percent of his job was on the road doing shuttles and delivery.

Q Okay. But when he was not driving –

A When he got into an accident?

Q – he was just doing the remainder of his regular job working inside, correct?

A He was inside.

Q Right. And that was part of his regular job, he spent – you know, was sorting inside, correct?

A I don't know if – I don't know if he was [65] sorting inside. I know they, they let him go inside and pulled him off – they had to pull him off the road, so he couldn't perform his second four hours classified air delivery work.

Q So he just did the other half of his job?

A From my understanding, he did his whole eight hours inside.

Q That's speculation on your part, right?

A No. I spoke with him, but I can't remember the exact conversation. But he was – I can – I can tell you that he was there longer than his four-hour shift pertaining to his other classification.

Q And do you know what work he was doing inside?

A No.

Q Do you know if it was anything different than his regular inside job?

A Other than the hours were longer, no.

Q Let me refer you to Paragraph 26 of your statement. Was Mia Johnson medically disqualified from driving?

A Yes.

[66] Q Do you know how long she worked inside when she was medically disqualified from driving?

A Oh, my goodness. For a long time, that's all I can tell you. For a very long time. She, she was on customer – she was at the customer service counter for, for quite awhile.

Q And when you worked at the customer service counter, that requires lifting and moving packages, correct?

A Well, not really. They have a roller. You have to see the setup. You have the counter and then people just – everything is like rolled, so you have a lot of assistance. So you're not really lifting. The customer puts it on the scale, if it needs to go on the scale, then they have a roller and they just – they can roll it really from the customer service counter all the

way back, and then somebody else does something with that after that.

Q But UPS requires employees working at the customer counter to be able to lift up to seventy pounds, doesn't it?

A Our weight is one-fifty. So they would be [67] required to lift up to one-fifty, seventy being the mark where they're supposed to get help. But I know all the customer service counter people and I know that they don't lift by themselves.

Q Let me refer you to Paragraph 27 of your statement involving Peggy – excuse me, Tammy Gatton.

A Umh-humh. Yes.

Q Did Peggy – excuse me. Did Tammy Gatton ever present a doctor's note with a lifting restriction or any other type of restriction?

A I want to say to the best of my recollection, talking about this to Tammy, because we all were in the Reserves at that time, her in the Navy, me in the Army, and she had injured her leg during, during training with her battalion, so she had lots of documentation about the injury to her leg and I'm pretty certain she brought it to work and they accommodated her.

Q Okay. Do you know what the doctor's – do you know – did you ever see any medical documentation?

A No, I didn't see it. This is a conversation [68] her and I had.

Q So you're relying on what she told you?

A Yes, I'm relying on what Tammy told me. She was a fellow soldier, so I felt as though I could rely on her.

Q Do you know what the medical documentation stated?

A Not in specifics, other than it explained the injury to her leg, about her leg.

Q And you say in Paragraph 27 that she was given a special truck?

A That's what she stated, yeah.

Q What type of special truck?

A I have no idea. She stated she was given a special truck so that she could have easy access. Perhaps she was given a truck where the steps are lower.

Q But you don't know?

A No, I don't. I used to see her truck but I paid it no attention.

Q Do you know if or whether or how it was different from the vehicle that other drivers drove?

[69] A Depending on the – I drive a much older model, so my steps are higher. The newer models I believe the steps are lower.

Q Okay. What type of platform did Tammy Gatton use?

A To get on the truck?

Q I don't know. You refer in Paragraph 27 to a special –

A Yeah.

Q – platform.

A That's what she told me. I never went over to examine the truck. She said that she – maybe they elevated the platform for her. I know she had like a special – what do you call those things, where you – cushions or whatever that sits in your chair, like the full seat cushions, I do remember seeing that.

Q But you don't know anything about it other than what she told you?

A Yes.

Q Correct?

A Correct.

Q Let me refer you to Paragraph 29 relating to [70] Kimberly Campbell. Kimberly – Kim Campbell had an on-the-job injury, correct?

A Yes.

Q Do you know when that was?

A No.

Q Let me refer to you Paragraph 30, relating to Regina McNair. Regina McNair also had an on-the-job injury, didn't she?

A No. She had hypertension.

Q So she was medically disqualified from driving?

A DOT, yes.

Q What work did she perform while she was medically disqualified from driving?

A What we just looked at, clerical.

Q How do you know that?

A How do I know she did clerical work? Because I used to see her at the clerical station.

Q During the fifteen minutes when you were inside the building?

A No, no, no, no, no. She did it in the evening, she did it in the afternoon. But I used to [71] see her at the – standing up at the computer typing and I was wondering why she was doing clerical work.

Q And do you know what she was – how do you know what she was doing when you were not inside the building?

A She was at the clerical station. So, so –

Q My question is how do you know what she was doing when you were not inside the building?

A I don't know. I just know that she was a clerk. I also know that recently, as her shop steward, she was taken off the road for disciplinary reasons and they put her in the same clerical station as she was working prior to her gaining back her DOT card.

Q When was Ursula Blunt pregnant?

A Oh. Over ten years ago. A long time ago.

Q And she was a supervisor?

A Yes.

Q And supervisors are not covered by the Collective Bargaining Agreement, are they?

A No.

Q Was Ursula Blunt accommodated in any way

* * *

[82] BY MS. GUSTAFSON:

Q It's difficult. I'm asking whether – isn't it true that the only people you know of who have lifting restrictions from their doctors are people who are either accommodated at UPS because it was an on-the-job injury or it was some kind of condition that [83] made them unable to drive and so they lost their DOT card or it was a pregnant woman whom they never accommodate?

MR. McGEE: Objection to the form of the question.

Q Is that correct?

THE WITNESS:

A Yes.

Q And if it's not correct, tell me of the other people you know who had lifting restrictions from their doctor that UPS wouldn't accommodate.

A To the best of my knowledge, the only light duty requested restrictions that became an issue were with women who were pregnant.

Q Okay. Thank you.

Isn't it rather common for pregnant women to have some sort of light duty restriction or limitation or recommendation from their doctor?

MR. McGEE: Objection to the form of the question.

Q In your experience as a shop steward at UPS?

MR. McGEE: Objection to the form of the question.

[84] Q When he objects it doesn't mean you can't answer.

A Oh.

Q He's just making a record. I'm sorry. I should have said that to you before. And the same if I object –

A Right.

Q – that doesn't mean you can't answer.

A As a shop steward and as a woman who's been pregnant, but before she – before I came to UPS, I can say that, that it's only a problem, for whatever reason, within the – and I would even venture to say in the last fifteen years, maybe ten, maybe in the last ten to twelve years, where they've sort of began to enforce this zero tolerance of pregnant women. And pregnant women are the only ones who at some point in their pregnancy, whether it be the first trimester or the second trimester, can't really risk lifting seventy, eighty pounds and ninety pounds all the way up to a hundred and fifty pounds without risking the pregnancy itself.

Q Did you have an eye injury at UPS recently?

[85] A Yes, I did.

Q And tell me about that. What happened?

A It was bizarre. I work – as I stated to Attorney McGee, that I am on a different shift now, I'm on the night shift. And what happened was management, Ostaffing for management is very limited, which is – furthers my point of how we work independently. I was on the job working and it was construction dust flew in and scratched my right retina and it became very, very bad, and I asked could I be relieved from the rest of my work schedule in order to go immediately and take care of my eye, and they had nobody to cover me. So I went to one of my customers that had an eye wash and I began to wash it out and try to clear it out as much as possible. I proceeded on with my shift.

The very next day I went to my own doctor. They treated my eye, and so forth, put a patch over it, told me that I had to be out, to give it a rest for two to three days. So they wrote me out – the doctor wrote me out for two days. While this was going on, my manager and my building manager [86] persistently called the house so that I could file a claim on my eye and come in and do TAW status. But I had already had it taken care of and I wasn't interested in filing a claim on my eye. But they jumped ahead and filed a claim for me. I didn't approve anything, I didn't sign anything, I didn't state anything, but they did all this while I'm home trying to recuperate. And I didn't go in. And they insisted I do come in, and I was like, no, I've already gotten treatment for my eye, I'm going to take care of it. So they had me – somehow they put me in a TAW status, but then somehow they went back into the system and took me out of the TAW status.

Q So your eye was injured at work?

A Right.

Q You didn't file a Workers' Comp. claim?

A No.

Q You didn't ask for Workers' Comp. coverage?

A No.

Q You didn't go to a UPS doctor?

A No.

Q You went to your own doctor?

[87] A Yes.

Q He gave you doctor's note saying that you needed to stay home for two days?

MR. McGEE: Objection to the form of the question.

Q He gave you a doctor's note saying you needed to stay home for two days, correct?

A Yes.

Q And UPS, instead of honoring the doctor's note telling you you needed to stay home for two days, was calling you and insisting that you come into work?

A Yes.

Q Did anybody offer you an explanation for that?

A Well, in defense, I have a new manager named Jim Lipis, L-I-P-I-S, and he did apologize emphatically after it was all blown over. He apologized emphatically. But it was indeed bizarre.

Q Who did you give that doctor's note to?

A I gave it to my – because I couldn't drive, so my daughter's the one that took me initially to the doctor, so the doctor gave, gave it to her and she [88] took it immediately to my job and they gave it to Timberly Davis.

Q And Timberly Davis is?

A My immediate supervisor. Timberly Davis is my immediate supervisor.

Q And who were the people at UPS calling you and telling you to come back to work?

A Jim Lipis and Rich Abolee (phonetic), I believe, I'm not sure of the spelling of his name, Abolee (phonetic), had Timberly call me several times.

Q Have you ever been aware of other people who had doctors' notes telling them to stay away from work, stay out of work and UPS was trying to get them to come back in?

A I am aware, but I can't – no names pop up right now. But –

Q Okay. If you think of any, let me know.

A Right.

Q You testified earlier about your clerical position that you've had. You said that when you were a clerk, if there was a heavy package you had someone help you put it on a cart.

[89] MR. McGEE: Objection to the form of the question; mischaracterization of testimony.

MS. GUSTAFSON: I believe it's an exact characterization. It's the exact words that I wrote in my notes.

BY MS. GUSTAFSON:

Q Correct me if I'm wrong. Is that what you testified to?

A Yes.

Q And you said at that time UPS didn't have any problem with you asking somebody else to help you move a package that was heavy; is that correct?

A No. I mean, yes, it's correct, and, no, UPS has never had a problem with us asking for help.

Q You're required to ask for help over seventy pounds, but you're permitted to ask for help at any point; are you not?

A Yes.

MR. McGEE: Objection to the form of the question.

Q You've never heard anybody at UPS tell an employee you may not get help with that package, it's [90] under seventy pounds, have you?

A No. And the reason being – if I may elaborate – is because customers are so savvy now that as the weight goes up, the price goes up, so I may have twenty boxes going out saying that they're only forty pounds, but in actuality they're seventy pounds, and we let them constantly go through the system. So that's why it's so important for you to do your eight-point test of weight, you know, shifting the package.

Q But when you use your DIAD and deliver the package, you're supposed to make sure it's the correct weight at the time that it's delivered; isn't that correct?

A Well, when you – yes, when you pick up the package – well, I do pickups now. So when I pick up the package I always correct the weight, yes.

Q And the person who's delivering the package has to put in the amount of –

A The correct –

Q – the package?

A – weight.

Q The correct –

[91] A Right.

Q – weight –

A Yes.

Q – with the DIAD?

A Yes.

Q And if a UPS employee delivered packages that claimed to be a small amount of weight when they were really a heavier weight, the UPS employee who owns stock in the company is hurting themselves, are they not?

MR. McGEE: Objection to the form of the question.

Q Because that person is having to pay less –

MR. McGEE: Objection.

Q – for that delivery?

MR. McGEE: Objection to the form of the question.

Q Isn't that correct?

A Yes.

Q You talked about putting things on a cart when you were a clerk.

A Yes. Which the clerks still do now.

[92] Q And you said if it was heavy somebody could help you put it on a cart. But is this – are they lowered onto the cart, are they lifted onto the cart? How does the cart work?

A Basically when a driver comes in, it's like a – it's just like a slide, like a steel slide, and when the driver comes in they put it at the top of the platform and they just – and it just – and push it down towards the clerk and it just slides down. Or they'll hand-carry it over directly to the clerk.

Q And then it slides down on a slide –

A Right.

Q – to a – how high is this slide?

A The slide is almost adjacent to the – to our – not – I wouldn't call it a platform, but it's, it's – the

slide is part of where the belt is, where the belt is inside the warehouse.

Q So when you had to scan a package on a slide and make the label for the package on the slide, were you working with something at waist height?

A Well, let me make a correction. When I did it – the scanners weren't even around when I did it. [93] I'm laughing. I'm sorry. But the scan – but now that they do it, it's with scanners and computers. When I did it, it was just – I would just handwrite a label, affix it to the package, and someone would put it on the cart and roll it back to whatever center it's supposed to go back to.

Q I've had clerical people talk to me as if they scan something and then a belt took it away.

MR. McGEE: Objection to the form –

Q Is that –

MR. McGEE: – of the question.

Q Do you know about that? Is that the way it's done now?

A For customer service, yes.

Q Oh, I see.

A That's definitely done, you know. Customer service is just a roller, like a roller belt that goes all the way from the customer service area into the warehouse area.

Q So that's why the customer service employee doesn't have to lift the package, because it's been taken away by a belt; is that correct?

[94] A Yes.

Q You testified earlier today that there were days when you didn't feel well and you were accommodated by being given a lighter load to start off the day. Is this something that was generally or commonly done among employees to help out another employee who was not feeling well that day?

A Yes, certainly.

Q And is the fact that you don't know any particular names of people because it was just a common thing, it wasn't something memorable?

A That's correct. But I also stated that I've helped out Otis Coates when he didn't feel well, when we worked together during the day shift. We no longer work together. But when we did, I would help him when he didn't feel well. I remember one specific occasion he was not feeling well.

Q You've testified earlier today about Sparkle Tyree in Paragraph 14 of your statement.

A Umh-humh.

Q And you testified that for a while when she was pregnant other employees, your statement says, [95] would make heavy deliveries for her; is that correct?

A Yes, umh-humh.

Q And you saw that she was carrying only light packages for a while. Did you know that she was pregnant at the time?

A Yes. She was showing.

Q Do you know approximately when – and excuse me if I'm forgetting it from your statement – oh. Here it says about a year and a half ago. You signed this statement in May of 2009. So was it early 2008 or late 2007, do you think, that Quatrise Pendleton was pregnant; is that the basic time frame? It was after Peggy Young; is that correct?

A Right, that was well after Peggy Young.

Q Okay.

A So I said it was about a year and a half ago, and another year to date has gone by, so the baby would be probably not quite three, not quite three years old.

Q So isn't it possible that the reason someone came to Bill Riggins and told him it's out of my hands, they won't let me work there anymore, is it [96] because Peggy had filed her discrimination complaint –

MR. McGEE: Objection to the form of the question.

Q – and UPS was now looking to see how pregnant women were being treated at UPS?

MR. McGEE: Objection to the form of the question. Objection because you're calling for speculation. You can lay a foundation, if you want, if there's any personal knowledge.

A That is quite feasible, that that could have happened in, in that type of sequence, yeah.

Q Were you aware at some point of Peggy Young's pregnancy discrimination complaint being known at UPS?

A Yes.

Q When did you first become aware of it?

A Well, Peggy was a very emotional person that tends to vent everything out loud. And Cici – that's right, Cici told me that she was going to sue, that's who told me. Cici told me. And I can recall Peggy saying this is disgraceful, the way she's being [97] treated, they cost her her medical coverage, and so forth, and she would just get all upset.

Q And it was sometime after that that Bill Riggins came to you and said it's out of my hands now, they won't let me work her anymore?

A Right.

MR. McGEE: Objection to the form of the question.

Q If you know.

A Yes, that was – yes, that definitely happened in that type of sequence.

Q You testified earlier about air drivers, I thought you did, all driving vans. But isn't it true that some drove minivans and some drove bread trucks, and maybe there was one other kind of –

A A 500. I drive a 500. I've always driven –

MR. McGEE: Objection.

A – a 500.

MR. McGEE: – to the form of the question.

Q So are there three different sorts of vans that your drivers drive, the minivan, the van, and the [98] 500?

A Well, there's only one van and that's the minivan. And then there's the bread truck and the 500.

Q So isn't it possible that if – that Quatrise Pendleton drove a bigger truck at some point and then began driving a minivan during her pregnancy?

MR. McGEE: Objection to the form of the question. Objection to the extent you're going for speculation. If you want to establish some foundation of personal knowledge, I don't have a problem with that.

A What I can say is I personally saw Quatrise in a van. Whether she graduate – whether she graduated downward and went from a box truck to a van, I can't specifically recall.

Q Okay. You testified earlier today about pregnant supervisors who were accommodated during their pregnancy, and you specifically mentioned Paula Ware who was your direct – your immediate supervisor, I think you said?

A Yes.

[99] Q And you said that during her pregnancy she no longer was required to go out on the road. Tell me in your experience, from what you know and observed from working at UPS, how often a supervisor such as Ms. Ware generally went out on the road when she wasn't pregnant?

MR. McGEE: Objection to the form of the question.

A What I can say is that an immediate supervisor in operations do what they call OJS's, on the job safety observation and training. So this is part of their duties. They do S&Vs, safety rides, on-the-job training rides. If any drivers had an accident they have to immediately go out with their driver, no matter how minor the accident, and do a safety and observation. And in general when they're short-staffed they'll brown down and go deliver packages, which is very common.

Q Does that mean – brown down, I'm guessing does it mean put on a uniform?

A Yes. I'm sorry.

Q And how often was it that a supervisor such [100] as Ms. Ware or Timberly Davis or Ursula Blunt would end up out on the road if they weren't being accommodated?

A I would say two to three times a week.

Q For a shift, or for how long?

A Well, if they went out – if they worked with that driver, they would have to be with that driver. If that supervisor went on the road with that driver, it would, it would definitely not be less than four hours, because they, they in turn had to find somebody coming back to the building. Or they stayed with you for the whole eight hours.

Q Do you understand why UPS has a policy of accommodating the pregnant supervisor –

A Yes.

Q – but not the pregnant bargaining unit employee?

A Yes.

Q Why is that?

A It's quite simple. It's money. UPS supervisors have unlimited sick leave, so you have to pay them for sitting at home. Whereas a union [101] bargaining

employee, once you state that you can no longer use them, you're not obligated to pay them. It's just money.

Q Did you know – what supervisors did you know other than Paula Ware who were accommodated when pregnant by not being sent out on the road?

A That's the only one that I can say I know firsthand, because Paula was my immediate supervisor.

Q Okay.

A So I was with her throughout her entire pregnancy.

MS. GUSTAFSON: Okay. That's all my questions.

THE WITNESS: Is that it?

MS. GUSTAFSON: Well, wait. You know what? That isn't. I just wanted to ask you – well, I can ask you these off the record – no, I'm going to go ahead and ask.

BY MS. GUSTAFSON:

Q This is your employee profile, and I wanted to know if you could tell me what any of these codes mean. DTAROR. The job change reasons? I'm assuming [102] where I see LOA it means leave of absence. WC might be Workers' Comp. something.

MR. McGEE: Objection to the form of the question.

Q Do you know if that's correct or not?

A No. January 7th, 2009, that's, that's before then. I want to say –

Q If you don't know, you can just say you don't know. I just wanted to know if you knew what any of those abbreviations stands for.

A No. This is the first time I've ever seen this.

MS. GUSTAFSON: Okay. I'm done, Mr. McGee.

EXAMINATION BY COUNSEL
FOR THE DEFENDANT

BY MR. McGEE:

Q Did Paula Ware ever refuse to go out on the road or do any other aspect of her job?

A I wouldn't know if she refused, no.

Q Did Paula Ware ever ask or request not to be – not to have to go out on the road or do any other aspect of her job?

A Not that I'm aware of, no.

[103] Q Did anyone tell Paula Ware that she did not have to go out on the road or do any other part of her job?

A Not that I recall, no.

Q Employees who work on the customer counter or customer service have to lift packages in order to put them on the belt, correct?

MS. GUSTAFSON: Objection. She's already testified – contrary to previous testimony.

Q Well, isn't that true, they have to lift the packages to put them on the belt?

A No. The way – the way the customer service – and I was down there fairly recently and I was surprised to even see this layout. It's the counter, and then you have a roller that goes all the way. So all you have to – so all you have to do is just have the customer place the package there, because the customer places the package on the scale if it needs to be weighed, then it can go on a roller that rolls all the way back into the warehouse area.

Q Okay. And how do you get the package from the scale on –

[104] A I don't know who gets it. I don't know who does that.

Q Somebody has to take the package off the scale and put it on the roller, correct?

A From the way that I see it, basically all they have to do is just slide it to the roller. They don't have to do like the eight-point lifting the way we have to do. No one has to do eight-point lifting the way drivers do.

Q Somebody, whether it's eight-point or not, somebody has to –

A Would have to use that method because that's the only safe method that's allowed in the building.

Q Somebody has to lift the package to put it on the roller?

MS. GUSTAFSON: Objection; asked and answered.

Q Correct?

MS. GUSTAFSON: She said they slide it.

A Because of who I know that works down there, and one of them is very sick, I don't see them lifting like we lift, no.

* * *

[111] to be able to lift up to forty pounds; isn't that correct?

A Correct.

Q And I'm saying – I'm asking you isn't it true that the packages that are delivered now, the air driver delivery packages are basically the same size that they were all those years ago, back when the limit was only forty pounds?

A This, this is the way I would answer that. Out of the air operation all our time-sensitive packages – ninety percent of those time-sensitive packages are under thirty pounds because of the expense

and the – you know, it's, it's, it's not ever feasible for the customer to send six EAM packages weighing seventy pounds unless it's an emergency.

Q When you say ninety percent of packages are under thirty pounds, you are completely estimating or guesstimating, are you not?

A I'm not guesstimating, because now that I'm in the p.m. and I see the pickup and when they pick up the air, it's just tons and tons of envelopes and letters.

[112] Q Would it surprise you to know that less than three percent of the packages that Peggy Young delivered as an air driver for a six- or seven- or eight-month period, less than three percent –

A Umh-humh.

Q – were under – were over twenty pounds?

A No. Because then you narrowed it down to her zip code area. When I gave you my percentage I was giving you the building percentage. I wasn't giving you the zip code percentage. So of course, it would even be less once you divide it all up amongst centers and zip codes.

Q And that's because Annapolis was a region that had a particularly light delivery –

A Well, they –

Q – load; is that correct?

A Well, they –

MR. McGEE: Objection to the form of the question.

A They had a light – lighter weight, you know, mostly documents, just a lighter weight. But it wasn't just Annapolis. I mean, a lot of centers have [113] just tons and tons of time-sensitive next-day air documents, international documents, that those are the things that Peggy's – the operation that Peggy was in would have handled.

Q And would it surprise you to know that ninety percent of them were under one pound?

A No.

Q Or less than one pound?

A No. Because you may have twenty – you may have five deliveries and ten of – ten envelopes to deliver. I mean, it's just – that's just the nature of that type of delivery. The earlier it is – basically the rule of thumb is the earlier the delivery, the lighter the package.

Q Because the more expensive the delivery is –

A Yes.

Q – is that correct?

A Yes.

MS. GUSTAFSON: No further questions.

A Like the fact that I work in the p.m., my load is much heavier.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff	:	
v.	:	Civil Action
UNITED PARCEL SERVICE, INC. Defendant	:	No.: DKC 08 CV 2586

Deposition of TYNETTE WILLIAMS
Greenbelt, Maryland
Wednesday, June 30, 2010
3:15 p.m.

Job No.: 3-181422
Pages 1-31
Reported by: Beatriz D. Fefel, RPR

* * *

[8] THE WITNESS:

A Yes.

BY MR. McGEE:

Q Did you only receive one draft or one version of the written statement, or were there previous versions that had to be corrected?

A No, just the one.

Q And how did you receive it? In the mail?

A I believe UPS.

Q Have you ever had any email communications with either Peggy Young or Miss Gustafson?

A Not relating to this. I have spoken with Peggy, like sending pictures of the kids, that's it.

Q What type of vehicle did you drive when you worked at UPS as an air driver?

A The smaller van, like Aerostar I believe it is. That was the main vehicle. But when I did – when I had to make a shuttle run to BWI every Saturday, that was in one of the larger vehicles that they call a 500.

Q Let me refer you to Paragraph 5 of your written statement.

A Umh-humh.

Q Where you state that "the employees that I [9] worked with knew of my pregnancy so they agreed to take heavy deliveries." What do you mean by "heavy deliveries"?

A The larger boxes that weighed more than like twenty pounds or so.

Q So you say normally as an air driver you would be required to deliver packages over twenty

pounds, but while you were pregnant some of your co-workers took those for you?

A As a UPS driver we are required to lift up to seventy pounds.

Q Did you ever present anybody at UPS with a doctor's note reflecting any type of lifting restriction or any other restriction on your ability to work when you were pregnant?

A During my second pregnancy I –

Q And just let me – when you say your second pregnancy –

A Right.

Q – you're talking about in late 2006?

A Yes, umh-humh.

I was going to one doctor and transitioned

* * *

[14] Q And that's, that's when you wanted to return?

A That was the end of my Family Medical Leave.

Q Right.

A Umh-humh.

Q Now, you state, I believe, that while you were pregnant and before you asked to go out on leave,

some of your co-workers helped you with your heavy packages?

A Yes.

Q Is that right?

A Umh-humh.

Q Did anybody in management instruct them to do that?

A No.

Q Just your union, bargaining union co-workers just did that on their own to help you out?

A Yes.

Q So as long as you did not present a doctor's note with a lifting restriction, you were able – you thought you would be able to, and you in fact were able to continue working while pregnant?

[15] A Yes. Until I start having swelling.

Q And you continued to work until you submitted a doctor's note that said you couldn't work at all and you wanted to go out on leave?

A Yes.

Q Do you believe anybody at UPS discriminated against Peggy White because – excuse me, Peggy Young because she's white?

A I can't really speak on that. I wasn't around her twenty-four hours a day. I didn't hear every conversation that was presented to her, so .

Q When was Quatrise Pendleton pregnant?

A I believe she was pregnant the same, or around about the same time that I was.

Q Did she ever present a doctor's note with a lifting restriction?

A That I don't know.

Q Did Quatrise Pendleton eventually go out on leave while she was pregnant?

A Yes.

Q Do you know how that came about?

A No, I don't.

[16] Q When did Quatrise Pendleton go out on leave? Was it before, or after you went out?

A I don't remember when she actually went out. She had to go out before me, I guess, by my statement.

Q Well, do you remember when that was?

A No. We talking years ago. No.

Q What type of vehicle did Quatrise Pendleton drive?

A She was in a larger UPS vehicle, like a 500, what they called it. But I do recall her switching to a van after everyone learned that she was pregnant. And I believe that was done by Bill, the air supervisor at the time, Bill Riggins.

Q So at that point – are you just assuming that that's the case, or do you know whether Bill Riggins or anybody else in admin specifically authorized or approved the change in vehicles?

A I'm almost certain Bill approved that for her.

Q What makes you say that?

A Just – if I remember correctly, just all of the complaints and other things that the drivers were [17] saying at the time. Because she was a person who always wanted to use a larger vehicle, even if she had one package.

Q So when she changed to – from a 500 to a van, the van she changed to was the same type of van that you and the other air drivers were driving?

A Yes.

Q Do you know, did she specifically request to make that change?

A I believe she did.

Q What makes you say that?

A Just because of all the confusion that surrounded that whole point. If I remember correctly, because the drivers were complaining about having to

deliver some of the packages in her area because they were larger and letting her take the letters. So, in essence, it was making them do more work because they were accommodating her, whereas my co-workers just agreed with me, the drives that were in my area.

Q Did anybody in management specifically instruct other employees to take Quatrise Pendleton's heavier packages?

[18] A Bill Riggins told the guys in the surrounding zip codes near her to either switch with her or give her the letters and they'd take the boxes.

Q Did you hear Bill Riggins say that?

A I'm sure I did. I can't give you a hundred percent answer.

Q Or are you just relying on what the other male drivers told you?

A No, I'm not relying on them. It was from what I witnessed being there in that area with all the confusion going on and the drivers mad because they had to do other work.

Q Well, did you specifically hear Bill Riggin give that instruction?

MS. GUSTAFSON: Objection; asked and answered. She already testified that she already did.

Q Did you hear Bill Riggins give that instruction?

A I'm not going to give you a hundred percent yes or a hundred percent no.

Q You don't know or don't remember?

A Exactly.

[19] Q When did Quatrise Pendleton stop working and go out on leave?

A I believe it was before I went out on leave.

Q And was that because she was told that if she wanted to work, she was going to have to deliver the heavy packages?

A No. I believe she was having other medical issues that ultimately caused – I believe she miscarried her child.

MR. McGEE: I don't have any other questions.

MS. GUSTAFSON: I have few questions for you, Miss Williams.

THE WITNESS: Yes, ma'am.

EXAMINATION BY COUNSEL
FOR THE PLAINTIFF

BY MS. GUSTAFSON:

Q Had you learned what had happened to Peggy Young when she brought in a note with a recommendation from her doctor that she not lift over twenty pounds?

A I can't remember.

Q Let me back up a bit.

Did you know Miss Young in the workplace?

[20] A Yes.

Q And she was pregnant before you; isn't that right?

A Yes.

Q And were you aware of the fact that she had brought in a note from her doctor recommending that she not lift over twenty pounds for the duration of her pregnancy?

A Yes.

Q And were you aware of the fact that UPS did not permit her to work at all after she brought in that note?

A Yes.

Q And is this how you came to be afraid yourself to bring in the note from the doctor that you talked about earlier? You said you had a doctor who wrote a note that said you needed to go on light duty but you were afraid to bring that in.

A Yes.

Q And you had that fear because of what had happened to Peggy Young; is that right?

MR. McGEE: Objection to the form of the

[22] Q Were you a UPS employee when you were pregnant the first time?

A Yes.

Q And in that first pregnancy, did you have any special needs that arose such as the swelling that you had in the second –

A The first – the first pregnancy I lost due to medical problems.

Q Oh, I'm sorry about that.

A Yeah.

Q I didn't realize that. Or maybe I knew that and had forgotten that. Excuse me.

A That's okay.

Q Now, Paragraph 6 –

A Umh-humh.

Q – says that –

A Now, because of what I knew – I know what you were going to ask about – as far as UPS policies in reference to light duty, I went to my air manager, Jim Harris at the time, and asked him – well, I told him that I was – that my doctor was trying to put me on light duty and asked him if there was any way [23] possible that I come in and do either another job which would just require like clerical work, which they call scrubbing packages, which you just correct packages all night or day, whatever the shift is, or if it

were possible that I get a stool in the back when I worked the first part of my job, which is preload, because I stood for four to five hours every morning and it was causing swelling in my leg. He said he didn't have a problem with it but he had to clear it with the manager at the time, which was Mike Weiner. When he approached him about it, he said that no, I would not be able to sit while doing the job, I either had to stand or go out. So that's when I produced my note to leave.

Q So at the time that you produced that note to leave, you were hoping that you could –

A Yeah.

Q – get some kind of accommodation to stay on?

A Because I could still do the job.

Q Is that correct?

So when Mr. McGee asked you earlier if you [24] went out because you wanted to go out, is that true? Or is it true that if they would have accommodated you by letting you use a stool –

A I would have –

Q – you would have liked to have stayed on?

A Yeah. I would have worked –

SKWRAO: Objection to the form of the question.

A I would have worked, because me sitting wouldn't have prevented me from doing my job.

Q How much sitting did you need to do?

A Maybe every thirty minutes sit down at least, just to get off my legs.

Q And did you just need to sit down for how much of that thirty –

A I mean, like, I worked like four to five hours in the back. If I could have sat down – like worked an hour, sit maybe thirty minutes and get back up and worked. But it would not have prevented me from doing my job.

Q Was there – was everything about your job something that you could have done while you were [25] sitting there on that stool?

A Yes.

Q So why wouldn't they let you sit on a stool for thirty minutes out of every hour and a half?

A I wasn't given a reason, just told that I couldn't.

Q Did you even get so far as to tell them how many minutes you would need to be sitting –

A No.

Q – or did you just ask if you could sit part of the time?

A No. I just asked if I could have a stool to sit part of the time while I worked, that's all.

Q Did anybody suggest to you that you should go talk to somebody else with this request?

A No. I only went to Jim Harris because I worked for him the majority of the years that I was there, and he knew. We just – we knew each other, so he knew that I just didn't want to go out.

Q Now, Jim Harris was your air center manager; is that correct?

A Yes.

[26] Q And Mike Weiner was your manager for the other part of your day?

A For preload.

Q For preload. Okay.

And the swelling problems in your legs were related to your pregnancy; is that correct?

A Yes.

Q Did your doctor tell you that if you sat part of the day it would help your legs?

A Yes. And that's why I was told every night to raise them or, you know, prop them up while I slept, or just to get off of them as soon as possible.

Q Forgive me if you've already said this.

A No problem.

Q What were you doing in your preload part of your job?

A The preload part of my job just consisted of me doing address corrections, basically that's it. Just look up everything in a computer, get a correct address, put the correct label on the packages, and process them through.

Q So there was nothing about your job that you [27] felt like you couldn't do so long as you could occasionally sit; is that correct?

A Yeah.

Q If UPS had permitted you to sit occasionally during your job, how much longer do you think you would have liked to have worked?

A I think I could have worked until my due date. If nothing more than just to receive my normal pay.

Q As it was, how long before your due date did you have to go out on disability?

A I went out in May, so that's three months ahead of my due date.

MS. GUSTAFSON: No further questions.

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR. McGEE:

Q The second doctor that you had –

A Umh-humh.

Q – was not going to allow you to lift heavy, heavy packages, was he?

A No.

Q So you couldn't have done that part of your

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF STEVE DUCA

I, Steve Duca, do hereby depose, affirm and state as follows:

1. I am over 21 years of age, I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration. I was hired by United Parcel Service ("UPS") in 1981, and am currently employed by UPS as a Business Manager (also known as a "Center Manager") in the Prince Georges Center at UPS's "DC Building" in Landover, Maryland. I have been a Business Manager for the last 13 years. As a Business Manager, it is my responsibility to be intimately familiar with the job requirements of all employees under my supervision, including delivery drivers.

2. All UPS delivery drivers, including early morning delivery drivers ("EAM delivery drivers") are required as part of their essential job functions to be able to lift 70 pounds. UPS requires all drivers,

including EAM delivery drivers, to be able to lift 70 pounds, because customers can and do ship packages weighing up to 70 pounds via UPS, including through UPS Next Day Air and Second Day Air services.

I hereby affirm under penalties of perjury that he foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: July 26, 2010 /s/ Stephen A. Duca
Steve Duca

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF ROBERT COWIE

I, Robert Cowie, do hereby depose, affirm and state as follows:

1. I am over 21 years of age, I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration.

2. I was hired by United Parcel Service ("UPS") in 1990, and I am currently employed by UPS as a Labor Manager. I have been employed as a Labor Manager at UPS continuously for the last six years.

3. As a Labor Manager, it is my responsibility to be intimately familiar with the collective bargaining agreement between UPS and the Teamsters Union.

4. The collective bargaining agreement does not permit a part-time bargaining unit employee to "bump" or displace a full-time employee.

5. Attached as Exhibit 1 is a true and correct copy of the following provisions of the collective bargaining agreement between UPS and the Teamsters Union that was in effect in 2006 and 2007: Article 14, Section 2; Article 16, Section 6; and Article 20, Section 4.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: July 27, 2010 /s/ Robert Cowie
Robert Cowie

NATIONAL MASTER
UNITED PARCEL SERVICE
AGREEMENT

[LOGO]

For the Period:
August 1, 2002 through July 31, 2008

* * *

When requested by the Union, time clocks will be left in place for employees to record their work hours for their own personal use.

ARTICLE 13. PASSENGERS

No driver shall allow anyone, other than employees of the Employer who are on duty, to ride on their track except by written authorization of the Employer,

except in cases of emergency arising out of disabled commercial equipment, accidents, or an Act of God, in accordance with Department of Transportation regulations.

ARTICLE 14. COMPENSATION CLAIMS

Section 1.

When an injury is reported the reference number will be given to the employee and when requested, a copy, of the injury report will be furnished to the employee within two (2) working days of such request. A copy of the injury report will also be furnished to the Local Union if requested by a Local Union official.

The Employer agrees to cooperate toward the prompt disposition of employee on-the-job injury claims. No employee will be disciplined or threatened with discipline as a result of filing an on-the-job injury report. The Employer or its designee shall not visit an injured worker at his/her home, without his/her consent.

The Employer shall provide the Union Co-chair of the National Safety and Health Committee with current summaries of the essential functions of all positions covered by this Agreement. The Union shall have the right to challenge any such summary through the applicable grievance procedure. Any employee who is adversely affected by any such summary shall have the right to challenge such summary through the applicable grievance procedure.

The Employer shall provide Worker's Compensation protection for all employees even though not required by state law or the equivalent thereof if the injury arose out of or in the course of employment.

An employee who is injured on the job, and is sent home, or to a hospital, or who must obtain medical attention, shall receive pay at the applicable hourly rate for the balance of his/her regular shift on that day. Upon receiving an employee's timely report of injury, the Employer shall not pressure an employee to continue to work. When, because of such pressure, an employee spends time in a clinic after his or her normal finish time, the time spent shall be the subject of a pay claim through the grievance procedure.

An employee who has returned to regular duties after sustaining a compensable injury, and who is required by the Worker's Compensation doctor to receive additional medical treatment during the employee's regularly scheduled working hours, shall receive the employee's regular hourly rate of pay for such time.

The Employer agrees to provide any employee injured locally immediate transportation, at the time of injury, from the job to the nearest appropriate medical facility and return to the job, or to the employee's home, if required. In such cases, no representative of the Employer shall be permitted to accompany the injured worker while he/she is receiving medical treatment and/or being examined by the medical provider, without the employee's consent. In the event that any employee sustains an occupational illness or

injury while on a run away from the home terminal, the Employer shall obtain medical treatment for the employee, if necessary, and, thereafter, will provide transportation by bus, train, plane or automobile to the employee's home terminal, if and when directed by a doctor.

In the event of a fatality, arising in the course of employment while away from the home terminal, the Employer shall return the deceased to the home of the deceased at the point of domicile.

Section 2. Temporary Alternate Work

The Company may continue a modified work program on a nondiscriminatory basis. This program is designed to provide temporary work opportunity to those employees who are unable to perform their normal work assignments due to an on-the-job injury. Employees shall be provided their guaranteed hours for the duration of TAW, provided the work is available. These guaranteed hours will be reduced as medical restrictions dictate.

The Employer will develop a list of possible TAW assignments by location. It is understood that this list may not be all-inclusive and management maintains the right to determine the availability and designation of all TAW assignments.

Any such program that has been, or is in effect, as of the effective date of this Agreement, shall be reduced to writing, a copy of which must be submitted to the

National Safety and Health Committee and the affected Local Union. If either party wants to include non-work related injuries or illnesses under the TAW program the parties will meet and agree upon such amendment. The Employer shall also meet with the Local Union upon request to discuss any changes the Local Union may propose in the TAW program. Any unresolved issues will be referred to the National Safety and Health Grievance Committee for resolution.

Section 3. Permanently Disabled Employees

The Parties agree to abide by the provisions of the Americans with Disabilities Act. The Company shall be required to negotiate with the Local Union prior to providing a reasonable accommodation to a qualified bargaining unit employee.

The Company shall make a good faith effort to comply in a timely manner with requests for a reasonable accommodation because of a permanent disability. Any grievance concerning the accommodation not resolved at the center level hearing will be referred to the appropriate Union and Company co-chairs for the Local Area or to the Region Grievance Committee, if applicable. If not resolved at that level within ten (10) days, the grievance shall be submitted directly to the National Safety and Health Grievance Committee.

If the Company claims that the individual does not fall within the protections of the Americans with Disabilities Act, then the grievance must follow the

normal grievance procedure in order to resolve that issue before it can be docketed with the National Safety and Health Committee.

Any claim in dispute concerning rights under this Section shall be addressed under the grievance and arbitration procedures of this Agreement. A grievance may be filed by an employee or the Union, notwithstanding any contrary provision in any Supplement, Rider or Addendum. The submission of a claim under this Section to the grievance and arbitration procedures of the Agreement shall not prohibit or impede an employee or the Union from pursuing their statutory rights under the Americans with Disabilities Act (ADA) or comparable state or local laws.

The parties agree that appropriate accommodations under this Section are to be determined on a case-by-case basis.

Section 3.1

Pursuant to Article 22.3 and Article 37 and notwithstanding language in the Supplements, Riders or Addenda, the Employer and the Union agree to meet and discuss certain full-time positions that may be filled by employees who can no longer perform their assigned job. When full-time openings occur, these employees will be given the opportunity to fill the opening prior to the Employer hiring from the outside. The employee must be physically fit and qualified to perform the new job. The employee placed in

the opening will be paid the rate for the job based upon the employee's seniority.

ARTICLE 15. MILITARY CLAUSE

Employees in service in the uniformed services of the United States, as defined by the provisions of the Uniform Services Employment and Reemployment Rights Act (USERRA), Title 38, U.S. Code Chapter 43, shall be granted all rights and privileges provided by USERRA and/or other applicable state and federal laws. This shall include continuation of health coverage as provided by USERRA, and pension contributions for the employee's period of service, as provided by USERRA. Employees shall be subject to all obligations contained in USERRA which must be satisfied for the employees to be covered by the statute.

The Employer, in its discretion, may make additional payments or award additional benefits to employees on leave for service in the uniformed services in excess of the requirements outlined in the USERRA.

Upon notification from an employee that he/she is taking USERRA-qualified military leave, the Employer shall notify the Local Union within five (5) business days.

ARTICLE 16. LEAVE OF ABSENCE

Section 1.

The Employer agrees to grant the necessary time off, without discrimination or loss of seniority rights and

without pay, to any employee designated by the Union to attend a labor convention or serve in any capacity on other official business, provided forty-eight (48) hours written notice is given to the Employer, by the Union, specifying length of time off. The Union agrees that, in making its request for time off for Union activities, due consideration shall be given to the number of employees affected in order that there shall be no disruption of the Employer's operations due to lack of available employees.

A Union member elected or appointed to serve as a Union official shall be granted a leave of absence during the period of such employment, without discrimination or loss of seniority rights, and without pay.

Section 2.

Any employee desiring leave of absence from employment shall secure written permission from both the Union and the Employer. The request for leave of absence shall be made in writing at least thirty (30) days before the day on which the leave is sought to commence. If the leave is not foreseeable, the employee shall submit the written request as soon as possible and shall include an explanation why the leave was not foreseeable. The Employer and Union shall respond to the request in writing within ten (10) days after receiving the request. The maximum leave of absence shall be for ninety (90) days and may be extended for like periods. Permission for same must

be secured from both the Union and the Employer. During the period of absence, the employee shall not engage in gainful employment, except as provided in Section 3 below.

Failure to comply with this provision shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights. The employee may make suitable arrangements for the continuation of health and welfare and pension payments before the leave may be approved by either the Local Union or the Employer.

Section 3. Loss of License

Section 3.1 Leave of Absence

When an employee, in any job classification requiring driving, loses his or her operating privilege or whose license has been suspended or revoked for reasons other than those for which the employee can be discharged by the Employer, leave shall be granted for such time as the employee's operating privilege or license had been suspended or revoked, but not for a period longer than one (1) year, provided the driver whose operating privilege or license has been suspended or revoked notifies the employee's immediate supervisor before the employee's next report to work of such suspension or revocation. The above provision need only apply to the first (1st) suspension or revocation except for suspension of commercial drivers license (CDL) of one (1) year or less duration.

Employees who take a leave of absence under this Section whose loss of operating privilege or license is the result of driving under the influence of drugs or alcohol will be allowed alternative work and to return to their job in accordance with Section 3.3 below.

Section 3.2 Alternate Work
(Other than Alcohol/Controlled Substance)

When an employee, in any job classification requiring driving, has lost his/her license under this Article he/she shall be afforded the opportunity to displace junior, one (1) full-time or two (2) part-time, inside employees, until he/she can return to his/her driving job, not to exceed one (1) year, unless provided for otherwise in the Supplements, Riders or Addenda. The employee shall receive the appropriate rate of pay for the job performed based on his/her seniority. Coverage for benefits shall continue for the length of the leave of absence or for the job duration, up to one (1) year.

Section 3.3 Alternative Work
(Alcohol/Controlled Substance)

When an employee, in any job classification requiring driving, has lost his/her license for driving under the influence of alcohol or a controlled substance he/she will be offered available inside work of one (1) full-time or two (2) part-time openings, not to exceed one (1) year, provided that the employee is assessed by a Substance Abuse Professional (SAP) and is released

to return to work by the SAP. The SAP shall establish the terms upon which the employee may return to work. The employee must also enter a rehabilitation program, if required by the SAP, within one (1) month of the SAP'S assessment. The employee shall be returned to driving once he/she successfully completes the rehabilitation program, provided his/her driving privileges have been restored. The employee shall receive the appropriate rate of pay for the job, performed based on his/her seniority, Coverage for benefits shall continue for the length of the leave of absence or for the job duration, up to one (1) year.

Any driver cited for Driving Under the Influence who does not have his/her license suspended, or who has limited driving privileges, shall be assessed by a SAP within five (5) working days of the citation. If the SAP determines the driver does not require rehabilitation, then he/she shall be allowed to return to driving. Until the assessment is completed, the driver shall be allowed to work inside in accordance with the paragraph above. If rehabilitation is required, the above paragraph shall also be applicable. The one time right to rehabilitation provided in Article 35, Section 4.11 shall not be applicable to a driver who completes a rehabilitation program under this paragraph, unless, as a result of the DUI citation, the driver is convicted or loses his/her license for driving.

This Section does not apply to the employee that has lost his/her license for being disqualified for testing positive for controlled substances.

Section 3.4 CDL Qualification

This Article shall also apply in the event an employee is unable to successfully pass the DOT commercial drivers license (CDL) examination provided the employee makes a bona fide effort to pass the test each time the opportunity presents itself.

Section 4. Maternity and Paternity Leave

It is understood that maternity leave for female employees shall be granted with no loss of seniority for such period of time as her doctor shall determine that she is physically unable to return to her normal duties and maternity leave must comply with applicable state and federal laws.

A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable.

Paternity leave shall he granted in accordance with Section 6 of this Article with the exception of employees not able to meet the qualifications set out in Section 6, who shall be granted leave not to exceed one (1) week.

Notwithstanding any provision to the contrary in any Supplement, Rider, or Addenda, an employee shall he allowed to designate in any vacation year paid time off up to twenty (20) days, to be used in the next vacation year, in accordance with this paragraph. Any paid time off that is provided on a weekly basis can only be banked in weekly increments. The accrued

paid time off may be used in the next vacation year to cover any period of time that (1) the employee is determined to be unable to perform her job due to pregnancy (for the father, time off is requested due to the birth) and (2) is not covered by the FMLA, existing disability plans or other paid time off. If the accrued time off is not used in that year, it will be paid to the employee within two (2) weeks of the request. If the vacation is not used as part of the leave, and it would have originally been taken in that vacation year, the employee shall also have the option of rescheduling the unused vacation as time off in accordance with local practice.

Section 5. Rehabilitation Program – Leave of Absence

An employee shall be permitted to take a leave of absence for the purpose of undergoing treatment in an approved program for alcoholism or substance abuse. Employees may use the United Parcel Service Employee Assistance Program (EAP), a Union sponsored rehabilitation program, as well as any other referral service in choosing an approved program for treatment.

The leave of absence must be requested prior to the commission of any act subject to disciplinary action except as provided in Article 35, Section 3 and Section 4. The leave of absence shall be for a maximum of ninety (90) days; additional time may be granted if it is mutually agreed between the Company and the

Union, or requested by the Substance Abuse Professional (SAP). While on such leave, the employee shall not receive any of the benefits provided by this Agreement, Supplements, Riders and/or Addenda, except the continued accrual of seniority.

If an employee voluntarily enters such a rehabilitation program, under the provisions of the Article, the following shall apply:

1. Before returning to work, the Employer shall ensure that the employee is "alcohol/drug free." This requirement shall be satisfied when the employee has provided a negative drug test result, as per cutoff levels contained in Section 3.3 or Section 3.4 of Article 35, as applicable, and/or an alcohol test with an alcohol concentration less than .02.

2. Within one (1) year of the date on which an employee returns to work, the employee may be subject to unannounced alcohol/drug testing, as specified in the return to work agreement. The one (1) year period may be extended only by the SAP and must be substantiated by written verification of the SAP.

3. Unannounced alcohol/drug testing for the above-mentioned employee, if required shall be determined by the SAP as provided in this Article. The date, time and place of collection for alcohol/drug testing, if required, shall be determined by the SAP.

4. Failure to comply with the after-care treatment plan or a positive specimen as part of the after-care

treatment plan will result in discipline pursuant to Article 35, Sections 3.13 and 4.12.

All alcohol/drug treatment agreements including pre-care, aftercare and return to work agreements entered into shall be confidential and signed by the employee and the SAP overseeing the treatment program and must have been approved by the Local Union business agent prior to the employee's signature. The post-care agreement shall comply with all provisions of this Article.

The Employer agrees to recognize the employee's rights to privacy and confidentiality while being party to such an agreement. The Employer agrees that in all circumstances the employee's dignity will be considered and all necessary steps taken to insure that the entire process does nothing to demean, embarrass or offend the employee unnecessarily.

Section 6. Family and Medical Leave Act (FMLA)

All employees who have worked for the Company for a minimum of twelve (12) months and worked at least 1250 hours during the past twelve (12) months are eligible for unpaid leave as set forth in the Family and Medical-Leave Act of 1993.

Additionally, any employee not covered above, that has worked for the Company for a minimum of thirty-six (36) months and accrued at least 625 paid hours during the past twelve (12) months is eligible for unpaid leave as set forth below, except that the

amount of leave allowed will be computed at one half (1/2) of the time provided by the FMLA.

Eligible employees are entitled up to a total of 12/6 weeks of unpaid leave during any twelve (12) month period for the following reasons:

1. Birth of a child;

2. Adoption, or placement for foster care;

3. To care for a spouse, child, or parent of the employee due to a serious health condition;

4. A serious health condition of the employee.

The employee's seniority rights shall continue as if the employee had not taken leave under this section, and the Employer will maintain health insurance coverage during the period of the leave.

The Employer may require the employee to substitute accrued paid vacation or other paid leave for part of the 12/6 week leave period.

The employee is required to provide the Employer with at least thirty (30) days advance notice before FMLA leave begins if the need for leave is foreseeable. If the leave is not foreseeable, the employee is required to give notice as soon as practicable. The Employer has the right to require medical certification of a need for leave under this Act. In addition, the Employer has the right to require a second (2nd) opinion at the Employer's expense.

The provisions of this section are in response to the Federal Act and shall not supersede any state or local law, which provides for greater employee rights.

ARTICLE 17. PAID FOR TIME

All employees covered by this Agreement shall be paid for all time spent in service of the Employer. Rates of pay provided for by this Agreement shall be minimums. Time shall be computed from the time that the employee is ordered to report for work and registers in and until the employee is effectively released from duty. All time lost due to delays as a result of overloads or certificate violations involving federal, state or city regulations, which occur through no fault of the driver, shall be paid for by the Employer.

The Employer will not allow employees to work prior to their start time without appropriate compensation.

Wages for properly selected vacations, in all instances, will be paid to the employees no later than the workday prior to their vacation. If the employee does not receive his/her vacation check, the Employer will make all reasonable efforts to provide the check the following day including delivery by Saturday or Next Day Air. Other shortages involving more than thirty dollars ($30.00) for full-time employees, and fifteen dollars ($15.00) for part-time employees, will be corrected and the payment will be made available to the employee at his/her reporting location on his/her second scheduled workday after reporting the shortage. If the Employer fails to make the payment

available on the employee's second scheduled work-day and the shortage was the result of the Employer's error, the employee will be paid an additional amount equal to one-half (1/2) of his/her daily guarantee at his/her regular hourly rate for every full pay period in which the shortage is not paid after the second (2nd) scheduled work day, until corrected.

Errors of less than thirty dollars ($30.00) for full-time employees or fifteen dollars ($15.00) for part-time employees and overages will be corrected in the following weekly paycheck.

All green checks will be taxed at the employee's regular withholding tax rate.

Paycheck stubs will show the year-to-date vacation, sick and personal leave balances.

ARTICLE 18. SAFETY AND HEALTH EQUIPMENT, ACCIDENTS AND REPORTS

Preamble

The Employer and the Union agree that the safety of the employees and the general public is of utmost importance.

The Employer and the Union have developed the following

* * *

Section 22. Incompatible Package Handling

The Employer agrees that all irregular or incompatible packages such as bars, buckets, exposed metal parts, tire rims, etc., shall be given special handling in accordance with UPS handling methods and local conditions.

Section 23. Union Liability

Nothing in the Agreement or its Supplements relating to health, safety or training rules or regulations shall create or be construed to create any liability or responsibility on behalf of the Union for any injury or accident to any employee or any person or does the Union assume any such liability or responsibility.

The Employer will not commence legal action against the Union, on a subrogation theory, contribution theory, or otherwise, as a result of the Union's negotiation of safety standards contained in this Agreement or failure to properly investigate or follow-up Employer compliance with those safety standards.

ARTICLE 19. POSTING

The Employer agrees to supply and provide suitable space for the Union bulletin board in each center, hub, or place of work. Postings by the Union on such board are to be confined to official business of the Union and on the Union's official letterhead or TITANS. In each package center there shall be a covered bulletin board. Union Stewards shall have a key

for the Union bulletin boards. The Employer shall not remove, tamper with or alter any notice posted by the Union unless such notice is harmful to the Employer. Any such notice removed by the Employer shall be re-posted if the Union's position is sustained through the grievance procedure.

ARTICLE 20. EXAMINATION AND IDENTIFICATION FEES

Section 1. Required Examination

Physical, mental or other examinations required by a government body or the Employer shall be promptly complied with by all employees; provided, however, the Employer shall not pay for any time spent in the case of applicants for jobs, but shall be responsible to other employees only for time spent at the place of examination or examinations where the rime spent by the employee exceeds two (2) hours, and in that case only for those hours in excess of said two (2). Examinations are to be taken at the employee's home area and are not to exceed one (1) in any one (1) year, unless the employee has suffered serious injury or illness within the year. Employees will not be required to take examinations during their working hours, unless paid by the Employer for all time spent. Employees shall be given reasonable notice of dates of examinations.

For those drivers subject to DOT regulations who possess a valid medical certificate from a designated DOT provider, the Employer shall pay for any

additional physical, mental, or other examinations required by the Employer to confirm the validity of the medical certificate.

Section 2. Return to Work Examination

It is understood by the Employer and the Union that once an employee notifies the Employer that he/she has been released to return to work by the employee's doctor, the Company doctor must examine the employee within three (3) working days from the time the employee brings the return-to-work slip to the Employer.

Section 3. Third Doctor Procedure

The Employer reserves the right to select its own medical examiner or doctor and the Union may, if it believes an injustice has been done an employee, have said employee re-examined at the employee's expense. If the two (2) doctors disagree, the Employer and the Union shall mutually agree upon a third (3rd) doctor within ten (10) working days, whose decision shall be final and binding on the Employer, the Union and the employee. Neither the Employer nor the Union will attempt to circumvent the decision of the third (3rd) doctor and the expense of the third doctor shall be equally divided between the Employer and the Union.

If the third (3rd) doctor agrees that the employee should be returned to work, the employee shall be

reimbursed at his/her daily guarantee, less any other monies received back to the date of the examination by the Company doctor. It shall exclude any time the employee was not available for examination or work.

Section 4. Disqualified Driver – Alternative Work

Except as provided for in Article 16, a driver who is judged medically unqualified to drive, but is considered physically fit and qualified to perform other inside jobs, will be afforded the opportunity to displace the least senior full-time or part-time inside employee at such work until he/she can return to his/her driving job unless otherwise provided for in the Supplements, Riders or Addenda. While performing the inside work, the driver will be paid the highest part-time rate as an employee with equivalent seniority or current area practice. If no full-time inside position is available, the Employer will meet with the Local Union to develop a full-time position, if possible out of available work.

Section 5. Identification

Should the Employer find it necessary to require employees to carry or record full personal identification, such requirements shall be complied with by the employees. The cost of such personal identification shall be borne by the Employer.

All management personnel shall wear a nametag identifying them as supervision while on duty.

ARTICLE 21. UNION ACTIVITY

Any employee member of the Union acting in any official capacity whatsoever shall not be discriminated against for acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of union membership or activities. Any employee shall have the right to wear a Union pin where there is a practice affording such a right.

ARTICLE 22. PART-TIME EMPLOYEES

Section 1.

No part-time employee shall drive except:

(a) when no full-time employee or combination full-time employee is on the premises;

(b) to avoid delay in the work; or,

(c) as provided for in Article 40 Air Operation.

Section 2.

The number of permanent full-time inside jobs in each Local Union area as of April 30, 1979, shall be guaranteed from replacement by part-time employees. In addition, the number of permanent full-time inside jobs created after April 30, 1979, under the provisions of Section 3 will also be guaranteed from replacement by part-time employees. The exception to

the above will be in cases of bona fide agreements prior to the ratification of this Agreement.

Section 3.

The parties agree that providing part-time employees the opportunity to become full-time employees is a priority of this Agreement. Accordingly, the Employer commits that during the life of this Agreement, it will offer part-time employees the opportunity to fill at least twenty thousand (20,000) permanent full-time job openings throughout its operations covered by this Agreement.

This commitment shall include the obligation to create at least ten thousand (10,000) new full-time jobs from existing, part-time jobs during the life of this Agreement throughout its operations covered by this Agreement; two thousand five hundred (2500) jobs during each year beginning in the third year of this Agreement. The Employer shall, wherever possible, reschedule

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF CAROLYN MARTIN

I, Carolyn Martin, do hereby depose, affirm and state as follows:

1. I am over 21 years of age. I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration. I am the mother of two children. I was hired by United Parcel Service ("UPS") in 1991, and I continued to be employed by UPS until May 1, 2010, when I retired, I am a registered nurse, and throughout my entire career at UPS, I worked in Occupational Health positions within the Human Resources Department.

2. Beginning in October 1996, I was the District Occupational Health Manager for the Metro D.C. District, which covered Maryland, the District of Columbia, and Northern Virginia. I had district-wide responsibilities and, as the Occupational Health Manager, I was the Human Resources official responsible for most issues relating to employee health and

ability to work, including approving leaves of absence under the Family and Medical Leave Act ("FMLA"), the administration of UPS's Program for Compliance with the Americans with Disabilities Act ("ADA"), the Federal Department of Transportation ("DOT") medical examinations and qualification requirements applicable to UPS drivers, and injury prevention,

I also was the official in the Metro D.C. District who made decisions about whether employees were able to perform the essential functions of their job based on restrictions imposed by physicians.

3. Under Article 14, Section 2 of the governing Collective Bargaining Agreement, UPS is required to assign temporary alternative work ("TAW") to bargaining-unit employees who are unable to perform their regular jobs because of an on-the-job injury covered by the workers' compensation laws. TAW for on-the-job injuries is temporary, generally limited to 30 days, and is part of a work hardening program that is designed to help employees return to their regular jobs as soon as possible, which reduces UPS's liability for workers' compensation benefits/pay.

4. Other than TAW for on-the-job injuries under Article 14, Section 2 of the Collective Bargaining Agreement, the only other situation in which a bargaining-unit employee may receive a light-duty accommodation is if the employee has a disability within the meaning of the ADA.

5. If an employee has a qualifying disability within the meaning of the ADA which prevents

him/her from being able to perform some aspect of his/her job, the employee may request an accommodation pursuant to UPS's ADA compliance procedure, which I was responsible for administering for the Metro D. C. District, Depending on the circumstances, a disabled employee might be entitled to an alternative work assignment or some other accommodation as a reasonable accommodation under the ADA.

6. Employees also are sometimes unable to perform their regular jobs as a result of an illness, medical condition, or injury that did not occur at work and, therefore, was not covered by the workers' compensation laws. As a matter of policy and practice, UPS's Metro D.C. District did not offer light duty or alternative job assignments to bargaining unit employees in those situations. If a bargaining unit employee had a lifting restriction or other restriction that rendered him/her unable to perform the essential functions of his/her regular job, the employee was required to take a leave of absence until the restriction was removed, For example, if a male employee injured himself engaging in recreational activities, yard work at home, or any other activity off the job and, as a result had a lifting restriction that made him unable to perform the essential functions of his regular job, the employee was not offered light duty or an alternative job assignment. I never approved or authorized any light duty or alternative job assignment in any such case. Instead, the employee would be required to take a leave of absence until the

lifting restriction was removed and the employee once again was able to perform the essential functions of his job. As the District Occupational Health Manager, I was responsible for deciding if a medical restriction rendered an employee unable to perform the essential functions of his/her job. In making those decisions, if I had any question about what the job requirements were, I referred to and relied on the Essential Job Functions list that UPS issues for various jobs, If a physician indicated that an employee should not lift more than a certain weight, but the Essential Job Functions list for the employee's job including lifting more than that weight, I would conclude that the employee was not able to perform the essential job functions and, therefore, would require the employee to go out on a leave of absence.

7. My policy and practice, and the policy and practice within the Metro D.C. District, was to treat pregnancy the same as any other off-the-job injury or medical condition. Pregnant employees were permitted to continue working as long as they wanted to during their pregnancies, unless and until the employee presented a doctor's note or other medical certification that she had a restriction that rendered her unable to perform the essential functions of the job. Pregnancy in and of itself would not result in someone being placed on a leave of absence or otherwise being prevented from continuing to work as long as she wanted to work; rather it is the lifting restrictions associated with pregnancy or any other non-work related illness or injury that UPS does not

accommodate. If the pregnant employee presented a doctor's note or other medical certification stating a restriction that rendered her unable to perform the essential functions of her job, the employee would be granted a leave of absence until the restriction was lifted and the employee was able to perform the essential job functions. As in other cases involving off-the-job injuries, or illness, and medical conditions, a pregnant bargaining unit employee who is not able to perform the essential functions of her job is not entitled to light duty or an alternative job assignment. However, pregnant employees who do not present with restrictions inconsistent with the essential job functions can and do continue working as long as they want to work. I am aware of many cases where pregnant employees, including delivery drivers, continued working their regular jobs well into the pregnancy, in some cases very close to the time they gave birth.

8. No supervisor or manager in the package operation had the authority to grant light duty, alternative job assignment or similar accommodation to a bargaining-unit employee who had a lifting restriction or other restriction that rendered him unable to perform the essential functions of the job, unless the restriction resulted from an on-the-job injury, If a supervisor or manager made any such accommodation for an off-the-job injury or illness, that would be a violation of Company policy, and if I ever became aware that had been done, I would immediately have put an end to it and required the

employee to go out on a leave of absence until the restriction had been removed and he was able to perform the essential functions of his job.

9. I first became aware of Peggy Young in 2005 or 2006 in connection with her requests for leaves of absence in connection with what I understood to be in vitro fertilization procedures that she was undergoing. I received documents from Peggy Young and her physicians requesting leaves of absence, and I approved those leaves of absence.

10. Some time in approximately October 2006, I was contacted by an operations manager concerning Peggy Young. I believe the manager was Jim Harris. He informed me that Peggy Young, who had been out on a leave of absence that she requested in connection with in vitro fertilization procedures, had presented a doctor's note stating that she could not lift more than twenty pounds. My understanding was that Peggy Young was interested in returning to work at that time but wanted to return in some type of light-duty assignment, and she had presented to someone the doctor's note with the twenty-pound lifting restriction in connection with her request for a light duty work assignment. I had not spoken to Peggy Young about returning to work at that time, and the first that I heard about this was from the manager. Since Peggy Young's restriction was not the result of an on-the-job injury, she was not entitled to light duty or an alternative work assignment. I knew that Peggy Young's regular job as an Air delivery driver required her to be able to lift and deliver packages weighing up to 70

pounds. UPS requires all drivers, including air delivery drivers, to be able to lift 70 pounds, because customers can and do ship packages weighing up to 70 pounds via UPS, including through UPS Next Day Air and other expedited delivery services. The Essential Job Function list for the Air driver position confirms that an Air driver must be able to lift up to 70 pounds. A true and correct copy of the Essential Job Functions list is attached hereto as Exhibit 1. Based on my understanding that Peggy Young's physician had imposed a restriction and the fact that delivery drivers, including Air drivers, are required to lift 70 pounds, I concluded that the lifting restriction rendered Peggy Young unable to perform the essential functions of her job, and I, therefore, informed the manager that Peggy Young could not resume working as an Air delivery driver while such a restriction was in place.

11. Sometime after my discussion with the manager, whom I believe was Jim Harris, I had a telephone conversation with Peggy Young in which she expressed an interest in returning to work. Peggy Young told me that she had a 20-pound lifting restriction, which I already knew about from my prior discussion with the manager. Peggy Young inquired about returning to work in some type of light duty assignment, but I informed her that she was not eligible for light duty because light duty is only granted to employees with on-the-job injuries. I knew that I had to treat Peggy Young the same way I would treat any other bargaining unit employee with a

similar restriction not resulting from an on-the-job injury, which meant that she was not entitled to light duty, and since the restrictions were inconsistent with the essential functions of her regular job, she could not return to work in her regular position as an Air driver either. I made all these decisions relating to Peggy Young on my own, and in making those decisions I did not seek or receive any input from anyone else. If a male Air driver had presented a 20-pound lifting restriction, I would have made the same decision – he would not have been eligible for or received any type of light duty, and since the 20-pound lifting restriction made him not qualified to return to his regular job as an Air driver, he would not be allowed to return until that restriction was removed.

12. At the time that Peggy Young contacted me in October 2006 about the possibility of returning to work, she already had exhausted all of the FMLA-equivalent leave that she, as a part-time employee, was eligible for. Nonetheless, her leave of absence was extended. I had nothing to do with coding Peggy Young's absence as "18."

13. If after Peggy Young presented with the 20-pound lifting restriction she had presented another medical certification indicating that the lifting restriction had been removed and that she was able to perform the essential functions of her job, she promptly would have been permitted to return to work. However, Peggy Young never presented me with any medical certification indicating that the

20-pound lifting restriction had been removed and that she was able to perform the essential functions of the job of an Air driver.

14. I never considered Peggy Young as having any restriction or limitation on her activities other than not temporarily being able to lift more than 20 pounds, and I understood and believed that that lifting restriction was only temporary, relating to her pregnancy which I knew was a temporary condition. The only reason that I considered Peggy Young to be temporarily unable to lift more than 20 pounds is because I was informed that her physician had imposed that restriction in connection with her pregnancy. I never considered Peggy Young to have any restrictions other than what was stated in her doctor's note.

15. If I had regarded Peggy Young as having a disability within the meaning of the ADA, I would have discussed the ADA procedure with Peggy Young and suggested that she apply for an accommodation under the ADA policy, but I did not do any of that because I did not regard Peggy Young as having a disability within the meaning of the ADA.

16. Although I determined that Peggy Young temporarily was not able to perform the essential job functions of her regular job as an Air driver, because that job requires an employee to be able to lift up to 70 pounds, I believe that Peggy Young could have performed any job that did not require lifting more than 20 pounds. Although most bargaining-unit jobs

at UPS require an employee to be able to lift more than 20 pounds, there are many jobs outside UPS that do not require an employee to lift more than 20 pounds.

17. I never granted light-duty to a pregnant Black employee who presented with a lifting restriction and was similarly situated to Peggy Young; nor did I ever authorize any such similarly-situated employee to continue working in any job that involved lifting more than the stated weight as an essential job function.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: July 27, 2010 /s/ Carolyn Martin
Carolyn Martin

Position:

Air Driver

Air Driver	On-Call Air Driver
Aft Shuttle Driver	Special Air Driver
Combo Inside Air Driver	Utility Driver

Essential Job Functions:

- Meet all of the applicable requirements as specified by the D.O.T.
- Bend, stoop, crouch, squat, climb, stand, sit, walk, and turn/pivot for up to 5.0 hours days per day, 5 days per week

- Ability to work varying shifts, additional hours and/or overtime depending on service needs
- Lift, lower, push, pull, leverage and manipulate equipment and/or packages 'weighing up to 70 pounds
- Assist in moving packages weighing up to 150 pounds
- Lift packages to heights above the shoulder and lower to foot level as appropriate
- Possess a valid driver's license and ability to drive vehicles with standard transmission safely
- Reach, grasp, and maintain control of items and materials used to perform activities associated with delivering and picking up packages including operation of the Delivery Information Acquisition Device (DIAD) and the DIAD Vehicle Adapter (DVA)
- Have a sufficient ability to communicate, through sight, hearing; and/or otherwise, to perform assigned tasks and maintain proper job safety conditions
- Maintain an acceptable work pace
- Report to work on a regular and timely basis and complete the scheduled workday on a consistent basis
- Work in an environment with:
  - variable temperatures and humidity (climatic conditions)
  - exposure to dust, dirt, and noise

  - enclosed work areas
  - outside inclement weather
- Work cooperatively in a diverse work environment
- Demonstrate cognitive ability to:
  - follow directions and routines
  - work independently with appropriate judgment
  - exhibit spatial awareness
  - read words and numbers
  - concentrate, memorize, and recall
  - identify logical connections and determine sequence of response
  - process up to 2-3 steps ahead
- Perform other functions that may be assigned

The essential functions of this job may vary greatly depending upon the size and location of the UPS facility. At some locations, employees may not perform all of the essential job functions listed above. At other locations, employees may perform some or all of the functions listed above and, in addition, maybe required to perform other jobs or tasks as directed, in addition, given the nature of the business, UPS retains the right to modify the essential functions of this position at any time.

[SEAL]

Department of the Army
Walter Reed Medical Center
Washington, DC 20307-5001

Reply to
attention of:

Sept. 13, 2006

UPS representative,

I have seen MRS. Peggy Young in my clinic. She is currently pregnant and it is my recommendation that she not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter. Please call 202-782-6114 with any questions.

Sincerely,

/s/TD Mamienski

Mamienski, Thaddeus
LT, MC, USN 8240
OB/GYN

NATIONAL MASTER
UNITED PARCEL SERVICE
AGREEMENT

[LOGO]

For the Period:
August 1, 2002 through July 31, 2008

* * *

When requested by the Union, time clocks will be left in place for employees to record their work hours for their own personal use.

ARTICLE 13. PASSENGERS

No driver shall allow anyone, other than employees of the Employer who are on duty, to ride on their truck except by written authorization of the Employer, except in cases of emergency arising out of disabled commercial equipment, accidents, or an Act of God, in accordance with Department of Transportation regulations.

ARTICLE 14. COMPENSATION CLAIMS

Section 1.

When an injury is reported the reference number will be given to the employee and when requested, a copy of the injury report will be furnished to the employee within two (2) working days of such request. A copy of the injury report will also be furnished to the Local Union if requested by a Local Union official.

The Employer agrees to cooperate toward the prompt disposition of employee on-the-job injury claims. No employee will be disciplined or threatened with discipline as a result of filing an on-the-job injury report. The Employer or its designee shall not visit an injured worker at his/her home, without his/her consent.

The Employer shall provide the Union Co-chair of the National Safety and Health Committee with current summaries of the essential functions of all positions covered by this Agreement. The Union shall have the right to challenge any such summary through the applicable grievance procedure. Any employee who is adversely affected by any such summary shall have the right to challenge such summary through the applicable grievance procedure.

The Employer shall provide Worker's Compensation protection for all employees even though not required by state law or the equivalent thereof if the injury arose out of or in the course of employment.

An employee who is injured on the job, and is sent home, or to a hospital, or who must obtain medical attention, shall receive pay at the applicable hourly rate for the balance of his/her regular shift on that day. Upon receiving an employee's timely report of injury, the Employer shall not pressure an employee to continue to work. When, because of such pressure, an employee spends time in a clinic after his or her normal finish time, the time spent shall be the subject of a pay claim through the grievance procedure.

An employee who has returned to regular duties after sustaining a compensable injury, and who is required by the Worker's Compensation doctor to receive additional medical treatment during the employee's regularly scheduled working hours, shall receive the employee's regular hourly rate of pay for such time.

The Employer agrees to provide any employee injured locally immediate transportation, at the time of injury, from the job to the nearest appropriate medical facility and return to the job, or to the employee's home, if required. In such cases, no representative of the Employer shall be permitted to accompany the injured worker while he/she is receiving medical treatment and/or being examined by the medical provider, without the employee's consent. In the event that any employee sustains an occupational illness or injury while on a run away from the home terminal, the Employer shall obtain medical treatment for the employee, if necessary, and, thereafter, will provide transportation by bus, train, plane or automobile to the employee's home terminal, if and when directed by a doctor.

In the event of a fatality, arising in the course of employment while away from the home terminal, the Employer shall return the deceased to the home of the deceased at the point of domicile.

[All underline in this document
appears as filed in the district court.]

Section 2. Temporary Alternate Work

The Company may continue a modified work program on a nondiscriminatory basis. This program is designed to provide temporary work opportunity to those employees who are unable to perform their normal work assignments due to an on-the-job injury. Employees shall be provided their guaranteed hours for the duration of TAW, provided the work is available. These guaranteed hours will be reduced as medical restrictions dictate.

The Employer will develop a list of possible TAW assignments by location. It is understood that this list may not be all-inclusive and management maintains the right to determine the availability and designation of all TAW assignments.

Any such program that has been, or is in effect, as of the effective date of this Agreement, shall be reduced to writing, a copy of which must be submitted to the National Safety and Health Committee and the affected Local Union. If either party wants to include non-work related injuries or illnesses under the TAW program the parties will meet and agree upon such amendment. The Employer shall also meet with the Local Union upon request to discuss any changes the Local Union may propose in the TAW program. Any unresolved issues will be referred to the National Safety and Health Grievance Committee for resolution.

Section 3. Permanently Disabled Employees

The Parties agree to abide by the provisions of the Americans with Disabilities Act. The Company shall be required to negotiate with the Local Union prior to providing a reasonable accommodation to a qualified bargaining unit employee.

The Company shall make a good faith effort to comply in a timely manner with requests for a reasonable accommodation because of a permanent disability. Any grievance concerning the accommodation not resolved at the center level hearing will be referred to the appropriate Union and Company co-chairs for the Local Area or to the Region Grievance Committee, if applicable. If not resolved at that level within ten (10) days, the grievance shall be submitted directly to the National Safety and Health Grievance Committee.

If the Company claims that the individual does not fall within the protections of the Americans with Disabilities Act, then the grievance must follow the normal grievance procedure in order to resolve that issue before it can be docketed with the National Safety and Health Committee.

Any claim in dispute concerning rights under this Section shall be addressed under the grievance and arbitration procedures of this Agreement. A grievance may be filed by an employee or the Union, notwithstanding any contrary provision in any Supplement, Rider or Addendum. The submission of a claim under this Section to the grievance and arbitration procedures of the Agreement shall not prohibit or impede

an employee or the Union from pursuing their statutory rights under the Americans with Disabilities Act (ADA) or comparable state or local laws.

The parties agree that appropriate accommodations under this Section are to be determined on a case-by-case basis.

Section 3.1

Pursuant to Article 22.3 and Article 37 and notwithstanding language in the Supplements, Riders or Addenda, the Employer and the Union agree to meet and discuss certain full-time positions that may be filled by employees who can no longer perform their assigned job. When full-time openings occur, these employees will be given the opportunity to fill the opening prior to the Employer hiring from the outside. The employee must be physically fit and qualified to perform the new job. The employee placed in the opening will be paid the rate for the job based upon the employee's seniority.

ARTICLE 15. MILITARY CLAUSE

Employees in service in the uniformed services of the United States, as defined by the provisions of the Uniform Services Employment and Reemployment Rights Act (USERRA), Title 38, U.S. Code Chapter 43, shall be granted all rights and privileges provided by USERRA and/or other applicable state and federal laws. This shall include continuation of health

coverage as provided by USERRA, and pension contributions for the employee's period of service, as provided by USERRA. Employees shall be subject to all obligations contained in USERRA which must be satisfied for the employees to be covered by the statute.

The Employer, in its discretion, may make additional payments or award additional benefits to employees on leave for service in the uniformed services in excess of the requirements outlined in the USERRA.

Upon notification from an employee that he/she is taking USERRA-qualified military leave, the Employer shall notify the Local Union within five (5) business days.

ARTICLE 16. LEAVE OF ABSENCE

Section 1.

The Employer agrees to grant the necessary time off, without discrimination or loss of seniority rights and without pay, to any employee designated by the Union to attend a labor convention or serve in any capacity on other official business, provided forty-eight (48) hours written notice is given to the Employer, by the Union, specifying length of time off. The Union agrees that, in making its request for time off for Union activities, due consideration shall be given to the number of employees affected in order that there shall be no disruption of the Employer's operations due to lack of available employees.

A Union member elected or appointed to serve as a Union official shall be granted a leave of absence during the period of such employment, without discrimination or loss of seniority rights, and without pay.

Section 2.

Any employee desiring leave of absence from employment shall secure written permission from both the Union and the Employer. The request for leave of absence shall be made in writing at least thirty (30) days before the day on which the leave is sought to commence. If the leave is not foreseeable, the employee shall submit the written request as soon as possible and shall include an explanation why the leave was not foreseeable. The Employer and Union shall respond to the request in writing within ten (10) days after receiving the request. The maximum leave of absence shall be for ninety (90) days and may be extended for like periods. Permission for same must be secured from both the Union and the Employer. During the period of absence, the employee shall not engage in gainful employment, except as provided in Section 3 below.

Failure to comply with this provision shall result in the complete loss of seniority rights for the employees involved. Inability to work because of proven sickness or injury shall not result in the loss of seniority rights. The employee may make suitable arrangements for the continuation of health and welfare and

pension payments before the leave may be approved by either the Local Union or the Employer.

Section 3. Loss of License

Section 3.1 Leave of Absence

When an employee, in any job classification requiring driving, loses his or her operating privilege or whose license has been suspended or revoked for reasons other than those for which the employee can be discharged by the Employer, leave shall be granted for such time as the employee's operating privilege or license had been suspended or revoked, but not for a period longer than one (1) year, provided the driver whose operating privilege or license has been suspended or revoked notifies the employee's immediate supervisor before the employee's next report to work of such suspension or revocation. The above provision need only apply to the first (1st) suspension or revocation except for suspension of commercial drivers license (CDL) of one (1) year or less duration.

Employees who take a leave of absence under this Section whose loss of operating privilege or license is the result of driving under the influence of drugs or alcohol will be allowed alternative work and to return to their job in accordance with Section 3.3 below.

Section 3.2 Alternate Work
(Other than Alcohol/Controlled Substance)

When an employee, in any job classification requiring driving, has lost his/her license under this Article he/she shall be afforded the opportunity to displace junior, one (1) full-time or two (2) part-time, inside employees, until he/she can return to his/her driving job, not to exceed one (1) year, unless provided for otherwise in the Supplements, Riders or Addenda. The employee shall receive the appropriate rate of pay for the job performed based on his/her seniority. Coverage for benefits shall continue for the length of the leave of absence or for the job duration, up to one (1) year.

Section 3.3 Alternative Work
(Alcohol/Controlled Substance)

When an employee, in any job classification requiring driving, has lost his/her license for driving under the influence of alcohol or a controlled substance he/she will be offered available inside work of one (1) full-time or two (2) part-time openings, not to exceed one (1) year, provided that the employee is assessed by a Substance Abuse Professional (SAP) and is released to return to work by the SAP. The SAP shall establish the terms upon which the employee may return to work. The employee must also enter a rehabilitation program, if required by the SAP, within one (1) month of the SAP'S assessment. The employee shall be returned to driving once he/she successfully completes the rehabilitation program, provided his/her

driving privileges have been restored. The employee shall receive the appropriate rate of pay for the job, performed based on his/her seniority, Coverage for benefits shall continue for the length of the leave of absence or for the job duration, up to one (1) year.

Any driver cited for Driving Under the Influence who does not have his/her license suspended, or who has limited driving privileges, shall be assessed by a SAP within five (5) working days of the citation. If the SAP determines the driver does not require rehabilitation, then he/she shall be allowed to return to driving. Until the assessment is completed, the driver shall be allowed to work inside in accordance with the paragraph above. If rehabilitation is required, the above paragraph shall also be applicable. The one time right to rehabilitation provided in Article 35, Section 4.11 shall not be applicable to a driver who completes a rehabilitation program under this paragraph, unless, as a result of the DUI citation, the driver is convicted or loses his/her license for driving.

This Section does not apply to the employee that has lost his/her license for being disqualified for testing positive for controlled substances.

Section 3.4 CDL Qualification

This Article shall also apply in the event an employee is unable to successfully pass the DOT commercial drivers license (CDL) examination provided the employee makes a bona fide effort to pass the test each time the opportunity presents itself.

Section 4. Maternity and Paternity Leave

It is understood that maternity leave for female employees shall be granted with no loss of seniority for such period of time as her doctor shall determine that she is physically unable to return to her normal duties and maternity leave must comply with applicable state and federal laws.

A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable.

Paternity leave shall be granted in accordance with Section 6 of this Article with the exception of employees not able to meet the qualifications set out in Section 6, who shall be granted leave not to exceed one (1) week.

Notwithstanding any provision to the contrary in any Supplement, Rider, or Addenda, an employee shall be allowed to designate in any vacation year paid time off up to twenty (20) days, to be used in the next vacation year, in accordance with this paragraph. Any paid time off that is provided on a weekly basis can only be banked in weekly increments. The accrued paid time off may be used in the next vacation year to cover any period of time that (1) the employee is determined to be unable to perform her job due to pregnancy (for the father, time off is requested due to the birth) and (2) is not covered by the FMLA, existing disability plans or other paid time off. If the accrued time off is not used in that year, it will be paid to the employee within two (2) weeks of the

request. If the vacation is not used as part of the leave, and it would have originally been taken in that vacation year, the

* * *

[text omitted in the exhibit filed in the district court]

the car condition report or other form required by law. Any automotive/maintenance person consulted will be noted on this report.

When the occasion arises where an employee gives a written report on forms in use by the Employer of a vehicle/equipment being in unsafe working or operating condition and receives no consideration from the Employer, the employee shall take the matter up with an officer of the Union, who will take the matter up with the Employer. But in no event shall an employee be required to operate a vehicle/equipment that is unsafe or in violation of any federal, state or local, rules, regulations, standards or orders applicable to equipment or commercial motor vehicles.

Copies of the car-condition reports or Driver Vehicle Inspection Reports (DVIR) will be available in centers for review by drivers. Upon notification, drivers may make copies of said reports in facilities that have copy equipment. In facilities with no copy equipment, the employee will be provided a copy as soon as practical, when requested. In no case will the copy of the DVIR remain valid after the DOT retention requirement (ninety (90) days) or the original DVIR expires. The current DVIR will be maintained in each vehicle

between completion of Preventative Maintenance Inspections (PMI). Other copies will be made available for review by drivers as required by the Federal Motor Carrier Safety Act (FMCS), 49 CFR 396, as applicable to the Employer.

Section 3. Accidents and Reports

Any employee involved in any accident shall immediately notify the Employer.

When required by the Employer, the employee, before the end of the employee's shift, shall complete a report of the accident including all available names and addresses of witnesses to the accident. The reference number will be given to the employee, and when requested, a copy of the accident report will be furnished to the employee within two (2) working days of such request. A copy of the accident report will also be furnished to the Local Union if requested by a Local Union official. In cases of equipment accidents where a Driver's Report of Accident form is completed, the employee will be given a copy of the form the same day, when requested. In facilities with no copy equipment the employee will be provided a copy as soon as practicable.

In the event of a vehicle accident, the Employer shall have twenty (20) days to complete its investigation, if warranted, and ten (10) days to take disciplinary action, if any, unless otherwise mutually agreed. Except for serious accidents, where the driver may be presumed to be at fault, a driver will not be removed

from the payroll during an investigation of the accident.

A serious accident is defined as one in which:

1. There is a fatality, or;

2. A citation is issued and there is bodily injury to a person who, as a result of the injury, receives immediate medical treatment away from the scene of the accident, or;

3. A citation is issued and one or more motor vehicles incur disabling damage as a result of the accident requiring a vehicle to be transported away from the scene by a tow truck or other vehicle, or;

4. Any vehicular contact with an aircraft which results in damage that grounds such aircraft, or;

5. There is an accident involving a motor vehicle on Company property, outside of any building, that results in a fatality or bodily injury to a person, who as a result of the injury receives medical treatment away from the scene of the accident.

The driver will be entitled to non-driving work during this period at his/her normal rate of pay.

The Employer and the Union mutually agree that the employee's rights to Union representation will be protected pursuant to Article 4 of the National Master UPS Agreement.

* * *

[text omitted in the exhibit filed in the district court]

If the third (3rd) doctor agrees that the employee should be returned to work, the employee shall be reimbursed at his/her daily guarantee, less any other monies received back to the date of the examination by the Company doctor. It shall exclude any time the employee was not available for examination or work.

Section 4. Disqualified Driver – Alternative Work

Except as provided for in Article 16, a driver who is judged medically unqualified to drive, but is considered physically fit and qualified to perform other inside jobs, will be afforded the opportunity to displace the least senior full-time or part-time inside employee at such work until he/she can return to his/her driving job unless otherwise provided for in the Supplements, Riders or Addenda. While performing the inside work, the driver will be paid the highest part-time rate as an employee with equivalent seniority or current area practice. If no full-time inside position is available, the Employer will meet with the Local Union to develop a full-time position, if possible out of available work.

Section 5. Identification

Should the Employer find it necessary to require employees to carry or record full personal identification, such requirements shall be complied with by the employees. The cost of such personal identification shall be borne by the Employer.

All management personnel shall wear a nametag identifying them as supervision while on duty.

ARTICLE 21. UNION ACTIVITY

Any employee member of the Union acting in any official capacity whatsoever shall not be discriminated against for acts as such officer of the Union so long as such acts do not interfere with the conduct of the Employer's business, nor shall there be any discrimination against any employee because of union membership or activities. Any employee shall have the right to wear a Union pin where there is a practice affording such a right.

ARTICLE 22. PART-TIME EMPLOYEES

Section 1.

No part-time employee shall drive except:

(a) when no full-time employee or combination full-time employee is on the premises;

(b) to avoid delay in the work; or,

(c) as provided for in Article 40 Air Operation.

Section 2.

The number of permanent full-time inside jobs in each Local Union area as of April 30, 1979, shall be guaranteed from replacement by part-time employees. In addition, the number of permanent full-time

inside jobs created after April 30, 1979, under the provisions of Section 3 will also be guaranteed from replacement by part-time employees. The exception to the above will be in cases of bona fide agreements prior to the ratification of this Agreement.

Section 3.

The parties agree that providing part-time employees the opportunity to become full-time employees is a priority of this Agreement. Accordingly, the Employer commits that during the life of this Agreement, it will offer part-time employees the opportunity to fill at least twenty thousand (20,000) permanent full-time job openings throughout its operations covered by this Agreement.

This commitment shall include the obligation to create at least ten thousand (10,000) new full-time jobs from existing part-time jobs during the life of this Agreement throughout its operations covered by this Agreement; two thousand five hundred (2500) jobs during each year beginning in the third year of this Agreement. The Employer shall, wherever possible, reschedule

* * *

[text omitted in the exhibit filed in the district court]

the Employer:

UNITED PARCEL SERVICE
NEGOTIATING COMMITTEE

James Maloney
Chairman

Chris Mahoney
Ed Burbage
Jack Dempsey
Ed Lenhart
Joe Maloney
Dawn Shanks
Joe Tringale
Headley Chambers
John Fitzgerald
Jerry Gordanier
Brian McCabe
Marc Nadeau
Jerry Nerone
Ed Padovan
Harvey Quinn
Sharon Ring
Dick Turner
Tony Coleman
Tim Eckert
Denise Gasti
Dan Hoyer
Mark Johnson
Norbert Kane
Pete Keane
Lindsay Marshall
Chuck Martorana
Tom McGowan
Sal Messina
Ben Miloro
Rich Peretz
Mike Rosentrater
Jack Royle
Tom Schultz
Ken Scott
Dan Smith
Ed Lynch

Teamsters
Atlantic Area
UNITED PARCEL SERVICE
Supplemental Agreement

For The Period
August 1, 2002
thru July 31, 2008

* * *

[text omitted in the exhibit filed in the district court]

employee who is hired off the street to fill a 22.3 job. If as a result of the Article 48 bid procedure a 22.2 opening that otherwise woul l be offered to part-time employees or filled by the Company will first be offered to all eligible employees who hold 22.3 full-time jobs within the building. The opening created by this move will then follow the respective bid language and be filled by part-time employees or by the Company.

All employees, including those who are red circled wage employees, who elect to bid to a lower paying wage classification shall receive the rate of pay for the classification to which they bid.

Those employees who are red circled wage employees will lose the protection of the red circle wage if they bid to a lower paying wage classification.

Should the employee transfer from a job covered under Article 22, Section 2, to another job covered under Article 22, Section 2, the employee will continue to receive the protection as outlined in that Article.

An Article 22, Section 3 full-time employee with a protected wage rate which is higher than the contractual rate shall not lose such protected inside rate as a result of bidding to another Article 22, Section 3 inside job. This protection applies only to the inside portion of their job.

D. The Employer shall recognize seniority, when possible, within the work group when it becomes necessary to move full-time inside and full-time combination employees (who are working the inside portion of their assignment) to another area.

Section 4 – New Jobs or Vacancies

A. During the year between posting of the schedule, employees in the order of their seniority shall have the right to move into a classification when a new permanent job or vacancy occurs in such classifications in the center or building, provided the employee is qualified to perform such job.

Full-time inside employees who bid out to driving jobs and fail to qualify as drivers shall not be eligible to come out again until all other full-time inside employees shall have had an opportunity to qualify as drivers.

B. A permanent job is defined as one that has been in existence for thirty (30) working days, except that all jobs added in November and December shall not be subject to bid. Those jobs, if they become

permanent, shall be posted for bid during the first week of January.

New permanent jobs and/or vacancies shall be posted for a period of seven (7) working days and awarded within the next seven (7) working days.

Section 5 – Package Area Bids

A. There shall be area bids for all full-time package delivery drivers in accordance with Section (3A) above. These bids shall be posted annually on April 1st. Delivery drivers in the order of their seniority shall be permitted the opportunity to bid the area of their choice within their center. Such area bid shall not be considered as a move for the purpose of a bid on a new vacancy as outlined in Section 6(A).

Such bids will be posted in each center and will remain posted for three (3) weeks. The first (1st) week of posting will be for employee review. During the second (2nd) and third (3rd) weeks the employees shall bid "in seniority order." A total of ten percent (10%) of the employees will bid each day. All employees shall bid on their assigned day; otherwise their bid will be made from the areas available at the time of their bid.

All package delivery drivers shall be placed on their bid route within thirty (30) calendar days following the completion of the bid.

Package drivers who did not exercise a bid will work as cover drivers.

The primary job of these employees is to cover vacations or absences of a week or more in duration.

These package cover drivers must select such work in seniority

* * *

[text omitted in the exhibit filed in the district court]

(a) Employees hired into the Trailer Repair and Utility classification shall receive the appropriate percentage of any negotiated increase to the top automotive mechanic rate on the date the increase is effective in accordance with the Atlantic Area Supplement.

(b) Employees gaining seniority within the Trailer Repair and Utility classification will be required to remain in the Trailer Repair and Utility classification and will not be permitted to bid on job openings outside the Trailer Repair and Utility classification, and in case of layoff will not be able to exercise their seniority outside this classification except as provided in 3(c) and 3(d) below.

(c) When apprentice openings occur in the Automotive Mechanic classification, the Company shall before going to the outside, offer these openings in seniority order to the employees in the Trailer Repair classification. When openings occur in the Trailer Repair classification the Company shall, before going to the outside offer these openings in seniority order to the employees in the Utility classification.

(d) The automotive mechanic who elected to move into the Trailer Repair classification when the Greensboro trailer shop was created

(1) Be compensated at the rate of pay as specified for automotive mechanics in the Atlantic Area Supplement.

(2) Be allowed to bid within the Automotive Mechanics classification. However, once such an employee bids out of the Trailer Repair classification, he shall not be allowed to bid back in at any future date.

(3) The Company shall make Health & Welfare and Pension contributions on behalf of all full time employees who gain seniority within the Trailer Repair and Utility classification in accordance with the Atlantic Area Supplement.

(4) The employees in the Trailer Repair and Utility classification shall enjoy all negotiated benefits relative to vacations, holiday, and sick days as listed in the Atlantic Area Supplement.

(5) It is understood that grievances involving issues covered by the Letter of Understanding shall be resolved by the parties at the district local level. Any unresolved disputes not covered by this Letter of Understanding shall be referred to the appropriate grievance procedure as specified by the Atlantic Area Supplement.

(6) This understanding shall remain in effect from contract to contract until renegotiated by the parties

signatory to this Letter of Understanding, or their successors.

L. W. Reeder
Union

Hershel Fitzgerald
Company

ARTICLE 63 – PART-TIME EMPLOYEES

Section 1

Part-time employees are defined as employees who, when reporting to work as scheduled, shall be guaranteed a minimum of three and one-half (3-1/2) hours. Part-time employees may be worked any period Sunday through Saturday. Part-time employees who work a sixth (6th) day shall be paid at the straight time rate. Part-time employees working in any part-time classification over five (5) hours in any shift or combination of shifts will receive overtime after five (5) hours, and/or for all hours of work in excess of thirty (30) hours in a week. This will not include part-time employees working as temporary cover drivers, helpers, or part-timers covered under Article 40 of the National Master Agreement. Double time (2) shall be paid when the employee works a seventh (7th) day.

Part-time employees will not be permitted to do delivery driving, feeder driving or tractor-trailer driving work except as otherwise provided in this Agreement. Part-time employees will be permitted to move vehicles within the confines of the Employer's property only for the purpose of avoiding delay in

their work except when unassigned drivers are available in the building.

Where part-time employees are used in the car wash classification, they will be permitted to drive equipment to and from the car wash.

Employees shall be given the opportunity in the order of their seniority to perform extra work available after the completion of their day's work provided that such employees are present, available, and qualified at such time as the work is to be performed. In no event, may employees displace other employees who have not completed their assignment.

The Company will recognize seniority within the work group when it becomes necessary to temporarily move part-time employees to another area. Employees must be qualified to perform the work.

Section 2 – Part Time Employees (Regular Temporary Package Drivers)

Seniority part-time employees may work as full-time regular temporary package drivers.

1. The Company agrees that regular temporary package drivers will be used to cover absentees, vacations, time off due to injuries, and long term illness in the package classification provided they meet all Company required qualifications and training.

2. The rate of pay for this job will be determined by the progression rate of pay as listed in the wage

schedule. The starting percentage will be seventy-five percent (75%). Part-time employees hired prior to July 1, 1982 shall be slotted into the progression at their present red-circled rate of pay.

3. When reporting for work as a regular temporary package driver, the employee shall be guaranteed eight (8) hours pay, as outlined in Article 52, Section 2. While working as a regular temporary package driver, employees will go through the wage progression outlined in this Agreement. Regular temporary package drivers who may work one (1) day in a week will be given a full week's credit towards progression. If the employee subsequently gets a regular full-time opportunity and is still in progression, the employee will slot in at his part-time rate or will continue in progression whichever is greater.

Regular temporary package drivers will continue to receive all benefits provided for them under the Labor Agreement including part time Health, Welfare and Pension payments.

4. The number of regular temporary package drivers will be determined in each center based upon previously listed considerations the list will be offered to part-time employees in seniority order provided they meet entrance requirements (i.e., licenses, medical, etc.).

5. Any employee who completes the thirty (30) day qualifying period as a regular temporary package driver will not have to complete another probationary period when he/she accepts a full-time driving job.

If that employee accepts a regular job prior to completing the probationary period, he/she will only have to complete the remaining portion of the thirty (30) day period.

6. Once the employees qualify, they will be assigned to a specific center for work opportunities.

a. When it becomes necessary to reduce the work force the least senior employee on the regular temporary package driver list shall be laid off first. In a building where there are two or more package centers, the affected regular temporary package driver may displace the least senior regular temporary package driver in the building.

b. A regular temporary package driver after following 6(a) provisions, not assigned to work as a regular temporary package driver on a given day, will be offered work on that day as a part-time employee. When work no longer exists (ten (10) working days) in the center for regular temporary package drivers, they will immediately revert back to their part-time center with all part-time seniority, including any part-time bid jobs they held under Article 40.

7. It is agreed that regular temporary package drivers will not be used if full-time seniority employees in the package classification

* * *

[text omitted in the exhibit filed in the district court]

A helper will normally not be required to work a split shift of helper work. There may, however, be occasions when an employee may work more than one shift as a helper in a twenty-four (24) hour period.

This work will be offered in conjunction with the seniority part-timers' present job responsibilities. The Company will keep the total hours worked to around eight (8) hours daily. Should there be occasions where the combined hours exceed eight (8) hours (excluding November and December), overtime will be paid on all hours worked in excess of eight (8) hours in that day. The employee will be required and allowed to perform his/her regular job assignment. In November and December overtime will be paid when the total hours exceed forty (40) hours. Overtime will be computed at the helper rate.

If a helper is scheduled to meet a driver and the driver is late at the scheduled meet point, the helper hours will commence from the scheduled time of the meet.

Air employees will be permitted to work as helpers provided the helper work schedule does not interfere with their present job responsibilities. The employee will be required and allowed to perform their regular job assignment. The Company will keep the total hours worked to around eight (8) hours daily. In normal situations, an employee will not be allowed to work more than two (2) shifts during a work day.

Section 5 – Part Time Employees Transferring to Full Time Jobs

After the completion of the Atlantic Area job selection procedures, the resulting opening will be filled as follows:

The permanent new job or permanent vacancy resulting from the procedure outlined above will be posted for a period of five (5) days. Part-time employees with six (6) months or more seniority may bid on a full-time opening in their building in all months, except November and December, providing they meet the same requirements as applicants for that full-time job. The job will be awarded to the senior bidding part-time employee.

The employee awarded the job must satisfactorily complete a thirty (30) working day training period. A part-timer who disqualifies himself cannot come out again for two (2) years. If the Company disqualifies him, he can come out one (1) year later in an attempt to qualify, if job is available. The above procedure will be applied on an alternating, five (5) for one (1) basis (e.g., for every six (6) jobs, five (5) will be filled as outlined above and the other from applicants from other sources).

Part-time employees successfully transferring to full-time jobs will be considered as newly hired full-time employees and will be added to the appropriate seniority list. Their seniority date will be the day of the transfer. Such employee shall be entitled to take all earned sick days and personal holidays and will be

paid at the rate of pay in the classification when earned. At the employee's option and/or request he/she may be paid for all days due. If in progression such employees will be entitled to follow the progression as it pertains to sick days, personal holidays and holidays as outlined in the Agreement. An employee who has completed the progression rate and transfers to a full-time position will not be required to go through progression again.

For vacation and retirement purposes, the employee shall receive additional seniority credit equal to all time worked as a part-time employee.

Section 6 – Part-Time Job Selection Procedure

Part-time employees will work off the part-time employees seniority list at each center.

The Employer will fill all vacancies and permanent new jobs for part-time employees from the part-time selection list in all months except November and December.

Qualified part-time employees with six (6) months or more of seniority may select permanent vacancies and new permanent jobs on any shift in the same building in all months except November and December including preferred jobs on their own or another shift. Such preferred jobs shall include, but not be limited to, part-time jobs such as: Preload, Sorter, Clerical, Irregular Train, Hazmat First Responder, Carwasher, Loader and Unloader. A permanent new

job for the purpose of this Article shall be one that has been in existence for a period of thirty (30) days.

Pending the job becoming permanent and the operation of the job selection procedure, management shall have the right to assign any employee to perform the work on a temporary basis. This job selection procedure shall be limited to three (3) moves – the original opening and two (2) others. The Company will fill the fourth (4th) opening.

Part-time employees with six (6) months or more seniority shall have the right to place their name on the list of employees waiting to be moved to a preferred job within their building. Such preferred jobs shall include, but not be limited to: Preload, Sorter, Clerical, Irregular Train, Designated Responder, Carwasher, Loader and Unloader. Employees do not have the right to select any specific unit, load or work station unless a prior past practice has been established.

Employees do not have the right to select any specific unit, load or work station unless specifically provided in the applicable Supplement, Rider or Addendum or an established practice thereunder.

All eligible qualified part-time employees shall be afforded the opportunity to put their name on the list of qualified employees waiting to be moved to a different shift or an upgrade classification. The car wash classification shall be considered a separate classification for bidding purposes. Each shift will have a separate list by classifications. An eligible

qualified part-time employee may sign their name and seniority date to any and all lists, but will be limited to three (3) moves per year. The jobs will be awarded in seniority order, on the Monday following the permanent vacancy or the job being declared permanent in accordance with the limitation described in the preceding paragraph. Employees who fail to qualify or refuse an opening may remain on the list for future openings. Employees desiring to move to sorter and preload jobs must be pre-qualified for that job.

Up to fifty percent (50%) of the preloaders in any preload operation shall be allowed to change their classification in any twelve (12) month period for any reason.

When the job selection procedure is applied and the result of this procedure is causing a disruption of the operation, the Local Union and the District Manager will immediately meet to work out a proper method to resolve the problem. If they fail to do so, the matter will be immediately referred to the Director of the Parcel and Small Package Trade Division or his designee and the appropriate UPS Vice President party to this Agreement, or his designee, to resolve the matter.

Section 7 – Reduction in Work Force

After a one (1) day layoff, part-time employees who are removed from their jobs as a result of a reduction

in the work force may elect to displace the most junior part-time employees in the building if qualified.

Section 8

After following the Atlantic Area reduction of force procedure, the following shall apply:

After a one (1) day layoff, full-time seniority employees who may be subject to layoff may in the order of their seniority elect to take the work of part-time employees, if any, for the duration of the layoff provided the full-time employee has more Company seniority than the part-time employee being displaced.

In such case, the employee will be provided with eight (8) continuous hours of work (unless otherwise mutually agreed to by the Company and the Union) at the appropriate rate for the classification of work, performed, except that:

A. If the laid off employee displaces a part-time employee and continues to perform the same work as his full-time assignment, he will continue to receive his regular wage rate.

B. If in the building there is a part-time employee receiving a higher wage rate than the rate of the displaced part-time employee(s), the full-time employee will receive such higher rate. However, if as a result of C below, another laid off employee receives more than the employee covered herein, this

employee will receive the same rate as the employee covered in C.

C. Employee(s) in progression will continue to receive their regular rate of pay.

D. The two (2) most junior employees in each center hired after ratification will be guaranteed eight (8) hours per day which may or may not be continuous.

The provisions of this Section shall not apply:

1. During the first three (3) days of emergencies beyond the Employer's control such as fire, flood, snow storm, power failure, T.O.F.C. delays.

2. During strikes against UPS or other companies which require a reduction of the work force.

Section 9 – Wages

A. Part-Time Employees

All part-time employees who have attained seniority as of August 1, 2002 will receive the following general wage increases:

August 1, 2002	seventy-five cents per hour ($.75)
August 1, 2003	seventy-five cents per hour ($.75)
August 1, 2004	eighty cents per hour ($.80)
August 1, 2005	eighty cents per hour ($.80)
August 1, 2006	ninety cents per hour ($.90)
August 1, 2007	one dollar per hour ($1.00)

Part-time employees still in progression on the effective date of the Master Agreement shall receive the

above contractual increases and will be paid no less than what they are entitled to in accordance with the wage schedules of Article 22, Section 5.

In addition to the general wage increases above, part-time employees who have attained seniority as of August 1, 2002 and were [illegible] red-circled in or before 1982, shall receive the following increase[illegible]

August 1, 2002	ten cents per hour ($.10)
August 1, 2003	fifteen cents per hour ($.15)
August 1, 2004	fifteen cents per hour ($.15)
August 1, 2005	twenty cents per hour ($.20)
August 1, 2006	twenty cents per hour ($.20)
August 1, 2007	twenty cents per hour ($.20)

B. Newly hired Part-Time Employees

All part-time employees who are hired or reach seniority after August 1, 2002, will be paid according to the following wage schedules:

	Hourly Rate	
	Preloader-Sorter	All Others
Start	$9.50	$8.50
Seniority plus ninety (90) calendar days	$10.00	$9.00
Seniority plus one (1) year	$10.50	$9.50
Seniority plus two (2) years	$11.00	$10.00
Seniority plus three (3) years	$11.50	$10.50
Seniority plus four (4) years	$12.25	$11.25

Employees working high volume direct or low volume direct shall receive the preloader/sorter rates.

Part-time clerical positions included in the bargaining unit as of 7/31/02 will be paid the preloader-sorter rate of pay.

C. The wage rates and increases provided in (a) and (b) shall be a minimum.

Package Driver Helper Rate of Pay shall be $10.50 per hour.

Section 10 – Health and Welfare

The Employer will provide full coverage for part-time employees equal in benefits to those of the full time employees in their area except that benefits covered shall not be effective until four (4) months after the date of hire and, except for weekly accident, sickness benefits and life insurance which shall be one-half (1/2) the amount a full-time employee would receive. There shall not, however, be any duplication of health and welfare coverage for part-time employees.

Identification cards and booklets that describe Local Union plan shall be provided for part-time employees which denote the schedule of coverage. Part-time employees shall be provided a schedule of benefits available to them.

It is agreed between the Company and Local 697 that the Employer will evaluate a number of alternative

procedures for part-time employees including pre-certification and utilization reviews, managed care, health care provider contracting and other various programs. The Company will implement those procedures or programs deemed necessary to continue quality health care service in a cost effective manner.

Section 11 – Pension

The Employer shall provide pension benefit coverage to part-time employees under the terms and conditions as may be contained in the United Parcel Service Pension Plan as required by law.

The Company and the Union agree that they will undertake to attempt to establish appropriate reciprocity agreements and to maintain all existing reciprocity agreements to protect the pension rights of employees.

UPS Part-time Pension Plan

(1) The UPS Pension Plan, covering only part-time employees working in areas where part-time employees are not covered by Teamster Pension Plan, will be improved to provide monthly benefits for a part-time employee with 750 paid hours of Credited Service per year.

The benefit formula in the UPS Pension Plan for current or future part-time employees who are participants will be increased [Illegible]tive August 1, 2004 to fifty-five dollars ($55.00) for each [Illegible] past

and future Credited Service to a maximum of 35 years [Illegible] Credited Service.

For example, the total monthly benefit will be equal to the following, provided the employee meets the credited service requirement.

$1,925 for retirement at any age after 35 years of part-time Credited Service

$1,650 for retirement at any age after 30 years of part-time Credited Service

$1,375 for retirement at age 60 with 25 years of part-time Credited Service

$1,125 for retirement at any age with 25 years of part-time Credited Service

(Based on $45.00 per year of Credited Service.)

(2) Part-time employees will receive one (1) year of Credited Service for 750 or more paid hours. (Six (6) months of part-time Credited Service will be granted for 375 to 500 hours worked in a calendar year, and nine (9) months of part-time Credited Service will be granted for 501 to 749 hours worked in a calendar year. This paragraph will also be applied to determine Credited Service for all full-time employees on the payroll on August 1, 2002 who were formerly participants in the UPS Pension Plan.

(3) The Employer will be responsible for funding the UPS Pension Plan as required to provide for benefits. The Plan will be governed by the terms of the Plan document.

(4) Effective August 1, 2002, the Employer will grant additional years of Credited Service in accordance with the terms of the Plan to all full-time and part-time employees on the payroll on August 1, 2002, who worked for UPS after they were 21 but were denied Credited Service solely because the UPS Pension Plan required that an employee be age 25 or older to participate in the UPS Pension Plan.

When a part-time employee successfully transfers to full-time, he/she will be provided, upon request, a personal profile of his/her United Parcel Service Company Pension Plan.

Section 12

Any claimed abuses of this Article with respect to the use of part-time employees shall be subject to the grievance procedure.

ARTICLE 64 – PAY PERIOD

All regular employees covered by this Agreement shall be paid in full each week. Not more than one (1) week's pay shall be held on an employee. Each employee shall be provided with a statement of total hours and gross earnings and an itemized statement of all deductions made for any purpose. Payroll checks shall be in sealed envelopes. Any employee leaving the Company will be paid on his or her next scheduled payday.

ARTICLE 65 – MAINTENANCE OF STANDARDS

Section 1 – Protection of Conditions

The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differential, and general working conditions, as negotiated or agreed upon, shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in this Agreement.

It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying terms and conditions of this Agreement.

ARTICLE 66 – SUBCONTRACTING

For the purpose of preserving work and job opportunities for the employees covered by this Agreement; the Employer agrees that no work or services presently performed by or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plan, person or non-unit employees, unless otherwise provided in this Agreement.

No owner-operators shall be employed and the Employer may not sell or transfer, directly or indirectly, to any employee any equipment or enter into leasing

arrangement with any employees for the operation of equipment owned by it.

ARTICLE 67 – LEAVE OF ABSENCE

Section 1 – Time Off for Union Activities

The Employer agrees to grant the necessary time off, without discrimination or the loss of seniority rights and without pay, to any employee designated by the Union to attend a labor convention [Illegible] serve in any capacity on other official business provided forty-eight (48) hour's written notice is given to the Employer by the Union specifying length of time off. The Union agrees that, in making its request for time off for Union activities, due consideration shall be given to the number of employees affected in order that there shall be no disruption of the Employer's operation due to lack of available employees.

Section 2 – Leave of Absence

Any employee desiring leave of absence from his employment shall secure written permission from both the Union and Employer. The maximum leave of absence shall be for ninety (90) days and may be extended for like periods. Permission for same must be secured from both the Union and Employer. During the period of absence, the employee shall not engage in gainful employment, except as provided in Section 3 below. Failure to comply with this provision shall result in the complete loss of seniority rights for the employees involved. Inability to work because of

proven sickness or injury shall not result in the loss of seniority rights.

It is understood that maternity leave for female employees shall be granted with no loss of seniority for such period of time as her doctor shall determine that she is physically unable to return to her normal duties. The employee must make suitable arrangements in writing for continuation of health and welfare and pension payments before the leave may be approved by either the Local Union or the Employer.

Section 3

A driver whose driving permit has been revoked is obligated to notify the Company before his next scheduled report, after being notified of said revocation.

When a driver's permit has been revoked. for reasons other than those for which he can be discharged by the Employer, leave shall be granted for such time as his permit has been revoked, but not to exceed two (2) years. An employee whose driver's permit has been revoked, but for not more than two (2) years, shall be offered non-driving jobs, where such jobs are available at the prevailing rate of pay for the classification of work he performs. Said employee will not be permitted to replace another full-time employee, regardless of seniority, but he may displace the most junior part-time employee in his location or be offered available work before it is assigned to new employees.

An employee who loses his driving privilege due to alcohol or drugs will not be allowed to bump present employees, however, he shall be offered all available work including different shifts, before hiring new employees. In the event an employee shall suffer a suspension or revocation of his chauffeur's license because of a succession of local, state or federal violations, caused by the employee complying with his Employer's instructions to him, the Employer shall provide employment for such employee at not less than his regular earnings at the time of such suspension for the entire period thereof subject, however, to the seniority and layoff provisions applicable to him at the time of such suspension. Successions referred to above shall not include any points or citations accrued toward suspension or revocation which are accumulated when the employee is not following Employer's instructions.

An employee shall be permitted to take a leave of absence for the purpose of undergoing treatment of an approved program for alcoholism. The leave of absence must be requested prior to the commission of any act subject to disciplinary action. Such leave of absence shall be granted on a one-time basis and shall be for a maximum of sixty (60) days unless extended by mutual agreement. While on such leave, the employee shall not receive any of the benefits provided by this Agreement, Supplements, or Riders except the continued accrual of seniority nor does this provision amend or alter the disciplinary provisions.

ARTICLE 68 – SICK LEAVE

Seniority employees shall receive five (5) days sick leave with pay as follows:

Seniority date plus twelve (12) months – one (1) sick day

Seniority date plus eighteen (18) months – one (1) sick day

Seniority date plus twenty-four (24) months – All sick days as provided herein for that entitlement year.

Employees in progression will continue in progression.

Option 1: An employee who has not used the five (5) days sick leave with pay shall be paid the appropriate number of days pay the first pay period following Christmas or such other time as the employee may request. This shall be construed to mean forty (40) hour's pay for full-time employees or twenty (20) hour's pay for part-time employees.

Option 2: An employee who does not use Option 1 may combine the five (5) days and schedule an additional one (1) week's vacation in its place. This shall be construed to mean forty (40) hour': pay for full time employees and twenty (20) hour's pay for part-time employees. This week shall be bid on a separate schedule.

Option 3: Employees will be paid sick leave in one (1) day increments upon request.

Option 4: Sick Leave Accumulation

Employees may accumulate their unused sick days for illness or injury while under doctor's care. In the event the sick days are used, payment shall be at the current rate. All unused sick days will be paid at the current rate of pay. It is agreed that the conditions listed above will not result in abuse or interference with the Employer's operation.

All tractor-trailer drivers who are bid to runs assigned a single trailer will receive the single rate of pay for all sick days.

All tractor-trailer drivers who are bid to runs assigned to double trailers will receive the double rate of pay for all sick days. Tractor-trailer drivers who bid on cover jobs will be paid sick leave based on the single or double rate, depending on which pay scale he has earned the majority of the time during the preceding twelve (12) month period.

Seniority employees who leave the employment of UPS shall be paid sick days on a pro-rata basis.

ARTICLE 69 – TERM OF SUPPLEMENT

The terms of this Supplemental Agreement are subject to and controlled by all provisions of Article 45 of the National Master United Parcel Service Agreement between the parties hereto.

IN WITNESS WHEREOF the parties hereto have set their hands and seals this ___ day of ___ 2002, to be effective as of August 1, 2002, except as to those areas

where it has been otherwise agreed between the parties:

IN WITNESS HEREOF the undersigned do duly execute the NATIONAL MASTER UNITED PARCEL AGREEMENT and Supplemental Agreements, Riders and/or Addenda.

ATLANTIC AREA NEGOTIATING COMMITTEE

For the Employees:
Ken Hall, Union Co-Chairman
John Steger, Union Co-Chairman

Steve Bishop
John Fridley
Johnny Sawyer
Denis Taylor
Ron Candler
Ricky Maxwell
David A. Vinson

For the Employer:
John Fitzgerald, Company Chair

Mark Aaron
Eric Bringe
Chris Clark
Dean Fragale
Dick Gough
Mark Johnson
Tom Leonard
Mark Alagna
Bill Carr
Tim Eckert
Dennie Gandee
Janice Hartgens
Pete Keane
Mike Murphy

STATEMENT OF PAT ARLINE-YOUNG

I, Patricia Arline-Young, state that the following facts are true, according to my personal knowledge:

1. I have worked at UPS, Inc., for approximately 21 years, in the "D.C. Building" which is located in Landover, Maryland. (There are two UPS buildings across the street from each other in Landover, Maryland. The one I work in is called the "D.C. Building.) I began working in the D.C. Building as a clerk. Later I became a part-time air driver. Now I am a full-time air driver. I have been a member of the bargaining unit (Teamsters Union) for all of these years.

2. As an air driver, I deliver packages that have been sent by customers who use a premium service called "air" delivery. Air delivery is more expensive by weight than ground delivery. Therefore, heavier packages tend to be sent by ground delivery, and lighter packages tend to be sent by air delivery.

3. UPS could easily show the weight of the packages that any driver delivers. All drivers carry handheld computers called Diads that record all the information about packages including who delivered it, where and when it was delivered, how much it weighed, and who signed for it. This information is on a document called a "Delivery Report". UPS pulls this information on particular drivers sometimes before disciplining them. UPS keeps this information for a very long time and possibly forever. I know that a judge in another state once ordered UPS to keep this information.

4. There are approximately 30 to 40 air drivers delivering packages for UPS from the D.C. Building every morning. Approximately 20 or so of them are part-time E.A.M. drivers ("early morning drivers" like Peggy Young). The others are full-time air drivers (like me) or full-time combo drivers (like India Brown) who drives part-time and does another job part-time. (India Brown is a Clerk/Driver Combo. Her "other" job is working as a clerk at a desk.)

5. For 20 years, I have been a shop steward at UPS. As a shop steward, it is my responsibility to be familiar with the collective bargaining agreement ("the contract"). I listen to the complaints of employees who work in the D.C. Building, and I am a witness and advocate for them and represent them before management.

MANAGEMENT IN THE D.C. BUILDING

6. The full-time managers in the D.C. Building are all male. (There are some female supervisors, but no female managers.) In our building there are managers in six centers: Bowie, Anacostia, Metro, University, Preload, and Local Sort. All of those managers are men. In order to become management, a UPS employee needs to be cultivated and promoted by someone, and this just does not happen with the women employees. I am the only female full-time air driver. I believe the fact that I am a woman puts me at a disadvantage at UPS.

LIGHT DUTY IN THE CONTRACT

7. Under the contract between UPS and the local Teamster's Union, UPS is required to give light duty to employees in a variety of different situations such as when an employee is injured on the job, or an employee cannot pass the Department of Transportation ("D.O.T.") test and get the D.O.T. card, or when an employee is pregnant and has a doctor's note.

8. In the contract light duty is sometimes referred to as "light duty" and sometimes as "alternate work", but when talking about it everyone calls these alternate assignments as "light duty". Whenever a driver can't do his or, her regular driving job for a while and works in the building instead, we say that he or she is "on light duty".

9. There are many different sorts of light duty jobs that bargaining unit employees can do that do not require heavy lifting. Here are some examples that I know about:

- Some employees just scan bar codes on packages. They don't lift the packages. The packages roll past the employees on rollers.
- Some employees key in bad addresses into a computer and make tags or labels for address corrections. They are called "AC Clerks" which stands for "address correction clerks"
- There are many clerical employees who do desk jobs like answering the phone, xeroxing, and those sorts of things. They are in the

same bargaining unit, and I represent them as the shop steward the same as I do the drivers.

- There are employees who just sort "smalls". Smalls are packages that are supposed to fit through a coat hanger. They do not weigh over 20 pounds. A "pick off man" further up the line picks off any package that is too large and puts it on the main belt to be shot back up to the regular guys to go through the main system to the trucks. The smalls are sorted into small bins. The smalls sorters never have to lift heavy weights. The baggers on the other side have to lift the bags.
- Employees in the car wash drive the vehicles through the sprayers then proceeds to park that vehicle.

10. Whether or not an employee gets light duty is up to his or her manager. It is decided on a case-by-case basis. It depends on who your manager is; how they feel; how they woke up that day; who the person is who is asking for light duty; and whether or not they want to help you. I believe there is a distinct bias against women. UPS has gotten away with so much of this for so many years. The fact that pregnant women have so much trouble getting light duty assignments at UPS is an example of this bias.

11. I have heard that UPS contends that UPS nurse Carol Martin makes decisions about whether or not employees are given light duty. This is not true. Except for Peggy Young, I have never known any

employee who was sent to Carol Martin with a light duty request, and I have never heard anyone at UPS say that she is the person with the authority to make decisions about whether or not an employee who requests it gets light duty. When Peggy told me that she had gone to talk to Carol Martin about light duty, I was confused about why she would have done that. I understand that Ursula Blunt told her to talk to Carol Martin, but I do not understand why. Managers are always the ones who decide whether an employee gets light duty. I believe Jim Hale was our center manager when Peggy was pregnant, and Myron Williams was the building manager. Either of these managers could have put Peggy on light duty, if they had wanted to. Nobody would have stopped them. That is just how it works.

PREGNANCY AT UPS

12. I know from my work as a shop steward that it is common for pregnant employees to have recommendations from their doctors that they not lift over about 20 pounds. It is easy for UPS to accommodate an air driver who cannot lift more than 20 pounds. It is not unusual for certain deliveries to be reassigned for a while if a particular driver has a problem of some sort. It's especially easy to accommodate a driver with a weight restriction on certain routes – such as the Annapolis route which Peggy Young does – where packages tend to be lightweight packages.

13. When Tynette Williams was pregnant a few years ago, the other drivers on her route exchanged deliveries with her so that she did not need to deliver any heavy packages.

14. About four years ago, Sparkle Tyree, another UPS air driver, was pregnant. For a while, she had other employees make her heavy deliveries for her. I remember seeing that she was carrying only light packages for a while. Then she brought in a doctor's note saying that she should not lift over 20 pounds. After she brought in a note, she was forced to go out on disability leave, even though she wanted to continue working.

15. Because I was an air driver with Peggy Young and Cici Richardson, I was well aware of Peggy's situation when she became pregnant and wanted to work but was forced to leave work. Peggy Young and Cici Richardson are the two air drivers who have delivered packages on the Annapolis route for a long time. Annapolis has hardly any heavy deliveries. Cici is the employee with more seniority, and she would divide the deliveries between herself and Peggy. Cici did not give Peggy any heavy packages to deliver. I knew that Peggy wanted to continue to do her regular job if UPS did not want to put her on light duty, and I know she should have been able to do that job. I did not involve myself with Peggy's situation directly because Cici was the shop steward who was representing her.

16. Quatrice Pendleton is another UPS air delivery driver. About a year-and-a-half or so ago, Quatrice became pregnant. She had had a miscarriage prior to this pregnancy, and she brought in a doctor's note saying that she could work but that she should go on light duty. She gave the note to her supervisor, Bill Riggins. Then Quatrice showed me the doctor's note and told me that Bill Riggins said she could not work and he was trying to send her' home because of her doctor's note saying that she needed to be on light duty. I told Quatrice that UPS had to let her work. I went to Bill Riggins and quoted to him from the contract where it says that a pregnant employee who brings in a doctor's note saying that she should work light duty will be given light duty. I said something like, "It's easy. Give her letters and let her work." When I was done talking, Bill Riggins said, "Let her work", and he let her work light duty for several months until she went out on disability leave.

17. It appears to me that UPS has a problem with letting pregnant women work. UPS wants to get rid of them as soon as they know they are pregnant.

18. All the pregnant UPS bargaining-unit employees that I can remember in the D.C. Building in recent years have had to go out on disability at some point during their pregnancies. I believe this is because UPS will not permit pregnant woman to work light duty when their doctors recommend light duty.

19. The supervisors are treated, differently. For some reason, they are accommodated when they are pregnant. Ursula Blunt, Timberly Davis, and Paula Ware are all supervisors or former supervisors who were accommodated during their pregnancies. They did not have to go out on the road at some point in their pregnancies, even though this is generally a regular part of their job. (The onroad supervisors usually take out routes when regular drivers are out. They ride along with drivers to supervise them, and they shuttle trucks around.)

LIGHT DUTY FOR OTHER CONDITIONS

20. It is common for UPS employees to have on-the-job injuries. I would estimate that approximately 20% of UPS employees in our building have been injured at some point.

21. UPS is good about giving light duty to some people who are not pregnant even when their problem does not relate to an on-the-job injury. Here are some recent examples:

22. On election day in 2008 an overweight package was dropped on my foot. UPS let me sit in the office and do light duty for about a month because of this injury. I typed forms and answered the phone and made copies. I did not lift anything near 20 pounds in weight.

23. Brandon Greening was a full-time UPS ground delivery driver who was put on light duty for

a while by Jim Harris when Brandon was undergoing chemotherapy treatments. (The ground drivers generally handle heavier packages than the air drivers do because air delivery is more expensive by weight so customers more often use ground delivery for heavy packages and air delivery for lighter packages.) Brandon's hair was falling out, and he let people know that he was undergoing treatment for cancer. For a good while when he was undergoing chemotherapy, he worked in the office with Terry every day. UPS accommodated him, and he did not have to go out on the road and make deliveries at all. I understand that he continued to get sick, and then he injured his shoulder at work, and he is now out on disability leave.

24. When the UPS drivers cannot pass the D.O.T. test, they work light duty in the building. (Other employees can tell when drivers are on light duty because the drivers who are on light duty do not wear their driver uniforms, and they stay at the building instead of going out on the road.)

25. Charles Cox is a UPS driver who was put on light duty for a physical problem that caused him not to get his D.O.T. card. He now sorts packages inside the building.

26. Mia Johnson is a UPS air driver who failed her D.O.T. exam because of high blood pressure. She was given light duty work in the building.

27. Tammy Gatton broke her leg (not on the job) and temporarily had trouble with her driver job. First

she was fired related to her physical problem. Then she was brought back on the job and given a special truck and special platform that she could use while her leg healed.

28. At the BWI UPS facility, two employees under Chas Berry, the manager of the UPS air facility at BWI, were unofficially permitted to work light duty when they were pregnant. One woman is named Dawn and the other is named Lauryn. When they weren't pregnant, their jobs had them doing heavy lifting and pulling heavy air containers. When they were pregnant, Lauryn was put in small sorting and Dawn was permitted to drive around in a small pulley or golfcart-type vehicle that pulls air tugs. I know this because in my job, drive a shuttle to the BWI facility every morning, and I am at that facility from approximately 5 or 5:15 to 7:00 every morning. (The reason I say that their light duty was "unofficial" is that I heard that they were permitted to do it because they did not bring in a doctor's note asking for it.)

29. Kim Campbell is a UPS driver who was put on light duty cleaning truck windows due to an injury to her arm while working.

30. Regina McNair is a driver who was put on light duty doing clerk work for a while. She just returned to her driving duties in the last month or so. I do not have personal knowledge about the reason she was on light duty because I did not talk to her about it, like I did the other employees.

FEARS OF RETALIATION

31. Most UPS employees are afraid to complain or to support other employees who are complaining because UPS fires people so easily. However, I believe it is right to complain about corporate wrongdoing and to support others who have legitimate complaints.

32. I believe that management in our building at UPS has a problem with women generally, and I have said so.

33. I was once fired, and I believe that it was because I am not afraid to complain about wrongdoing or to support others who complain. Someone in management at UPS falsified a letter to make it look like a customer had complained about me. The letter was even notarized by a UPS employee. I investigated the matter and learned that the customer had not written the letter. The customer gave me a letter saying that the letter of complaint was a fraud. This is the reason employees are afraid to complain. UPS will leave you alone if you are not complaining, and look at you real close and tear you apart if you dare to complain.

34. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

35. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson.

Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

I state under penalty of perjury that the foregoing is true and correct. Executed on May 21st, 2009.

/s/ Pat Arline-Young
PAT ARLINE-YOUNG

STATEMENT OF CHARLES COX

I, Charles Cox, state that the following facts are true, according to my personal knowledge:

1. I am a combo driver with UPS. This means that I do two part-time jobs to make up one full-time job. My regular part-time jobs are on the small sort (starting about 3:00 a.m.) and as an express air driver (starting at about 8:30 or 9:00 a.m.).

2. Most all of the packages that are handled on small sort are letters and small packages that weigh less than 20 pounds. Not very often, but sometimes, heavier packages accidentally get put on the small sort belt. There are usually about 10 people working on the small sort, so if one person cannot lift a heavier package the other people on small sort could lift it. Not every one working on small sort handles every package. If one person could not handle a package, they could just let it go further down the belt to be handled by someone else.

3. I have seen people who had lifting restrictions because of on-the-job injuries be moved to work in small sort for a while. I have seen people with an ankle injury be moved to small sort. I don't know their names, but I have seen it happen. I have seen other drivers come in and do clerical work or just handle paperwork or the phones when they are on light duty.

4. In 2009 I was diagnosed with sleep apnea, and I could not do my driving job for a while because

of that. When I could not do my driving job, UPS permitted me to return to work in the evenings to do some extra inside work so that I could try to get in 8 hours per day so that I could continue to receive my medical benefits. (We full-time combo drivers have to work 140 hours per month to maintain our health benefits. Part-time drivers have different pay and benefits.)

5. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

6. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson. Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

I state under penalty of perjury that the foregoing is true and correct. Executed on ~~May~~ ___, 2010.

/s/ C.M. Cox
Charles Cox

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, Plaintiff, v. UNITED PARCEL SERVICE, INC., Defendant,	)	Civil Action No. DKC 08 CV 2586.

STATEMENT OF
SHARON FAST GUSTAFSON

I am Plaintiff's attorney in the above-captioned case. Pursuant to 26 U.S.C. § 1746, I state the following pursuant to my own personal knowledge:

1. In response to discovery requests, UPS produced records of deliveries made by Peggy Young during the eight months (approximately 35 weeks) from November 2008 through June 2009. UPS produced pages stamped D1284-D4228, which comprise 2,944 pages. Of the 2,944 pages, 155 are cover pages (e.g., Plaintiff's Exhibit 39) that list and summarize individual deliveries but give no weights. The remaining 2,789 pages (e.g., Plaintiff's Exhibit 40) each showed one delivery. I cannot determine whether there are deliveries listed on those 155 pages for which there are no records among the other 2,789 pages, but I have attempted in any event to take into

account every individual delivery substantiated in these 2,789 pages.

2. I hired a student to tabulate the data from these pages, under my supervision. For each of the 155 cover pages he recorded the relevant dates. For each of the remaining 2,789 pages, he recorded a date and a weight.

3. From that tabulation, I oversaw the preparation of a list of deliveries exceeding 20 pounds in weight.

4. I then hired a second student to review again all 2,944 pages under my supervision, to identify each page that records a delivery of more than 20 pounds (or more than 9.1 kilograms), and to confirm that no delivery of more than 20 pounds (or more than 9.1 kilograms) was missing from my list. I paid him a bonus for each overlooked delivery that he spotted, and he found (a) two deliveries (pages 1676 and 42 10) that were properly recorded on the tabulation but that were omitted from my list and (b) a third delivery (page 4020) of 60 pounds that was not accurately recorded on the prior tabulation (and was therefore not on my list). I have spot-checked the students' work, and I am confident that the following information is correct.

5. Of the 2,789 pages showing a single delivery, the following 78 pages – i.e., 2.8% of the total pages – showed deliveries of packages weighing more than 20 pounds (or more than 9.1 kilograms):

Page	Weight
1676	12.5kg
1746	26.6
1749	25.5
1751	25
1753	25
1756	36.8
1759	21
1761	21
1764	46
1767	28
1769	28
1771	40
1773	40
1775	23.1
1778	28.1
1781	30
1783	30.7
1785	39
1787	26
1790	25
1793	23
1795	22
1798	29.1
1800	23.5
1803	44
1806	35.2
1809	27.3
1843	21.8
1867	25
1889	43
1895	43
1909	30.6
1933	28.3
1948	24
1962	26
2095	20.3
2097	29.6
2199	29.8
2240	98
2282	51.2
2506	21
2515	39
2527	35.5
2529	34.3
2545	58.4
2548	59.7
2717	27.2
2733	22
2791	28.2
2851	28
2886	26.6
2935	42.4
3067	33
3075	24
3233	26.9
3239	21.7
3267	47.1
3270	70
3273	70 (dup.)
3316	43
3447	30
3471	30 (dup.)
3555	90
3561	31.3
3613	58
3651	24.7
3654	28.9
3658	27.6
3688	24
3787	90
3872	90
4008	31.2
4017	75
4020	60
4023	20.3
4191	30
4208	25.7
4210	22.2

6. The tracking numbers on the records show that page 3273 duplicates page 3270, and page 3471 duplicates page 3447 (as indicated above by "dup."). The records that UPS produced thus substantiate not 78 but 76 distinct deliveries of packages weighing more than 20 pounds in the eight-month period.

7. I assume that the proportion of duplicates is random throughout the pages, and that therefore the proportion of duplicates I found among the pages of deliveries over 20 pounds (i.e., 2 out of 78, or 2.6%) is equivalent to the proportion of duplicates throughout the total pages. If 2.6% of the 2,789 pages showing individual deliveries are duplicates, then those 2,789 (discounted by 2.7%) represent 2,716 deliveries over eight months. This yields an average of about –

- 340 deliveries in each of 8 months, or
- 78 deliveries in each of 35 weeks, or
- 16 deliveries in each business day.

8. 76 deliveries of packages weighing more than 20 pounds in that period yields an average of about two such deliveries per week (i.e., 76 ÷ 35 = 2.17).

9. Of the 76 deliveries exceeding 20 pounds, only 32 deliveries – i.e., less than 1 delivery per week – exceeded 30 pounds. Only 12 of those deliveries – little more than one a month – exceeded 50 pounds. Of the 12 deliveries exceeding 50 pounds, 5 deliveries exceeded 70 pounds (the supposed requirement of the air driver), and for those 5 heavy deliveries Ms. Young was required to use assistance in any event.

10. The documents marked as Plaintiff's Exhibits 1-40 and submitted in support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment are documents that were exchanged by the parties during discovery in this case.

I state under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of September 2010.

/s/
Sharon Fast Gustafson

STATEMENT OF MIA JOHNSON LYNCH

I, Mia Johnson Lynch, state that the following facts are true, according to my personal knowledge:

1. I work as a driver at UPS out of the building in Landover, Maryland, that is called the "D.C. Building". I am a member of the bargaining unit.

2. I have ongoing hypertension. Sometime a while back, I lost my DOT card due to high blood pressure. I was reclassified from driver to data tech on the preload. I did not operate a vehicle for a few months during this time. I only scanned packages and made address corrections, and put on address labels. I did not have to lift the packages, but I did have to flip them on the belt. Then I got my DOT card back, and I returned to my driver job.

3. I remember another driver, a man whose name I don't know, who was also given light duty for high blood pressure.

4. Sometime around May 9, 2009, my driver's license was suspended due to unpaid violations. On May 14, 2009, before I realized that my license was suspended, I was in an accident at UPS. It was the other driver's fault. I was not terminated right away, and I was put on light duty at the customer counter.

5. On about June 26, 2009, I was fired from UPS for driving on a suspended license (even though I had not known about the suspended license at the time of the accident). At the time I was fired, I had been working light duty at the customer counter. I

appealed the firing, and I won the hearing. Then I was permitted to come back to work. When I came back to work, I returned to light duty working at the customer counter because I was not supposed to lift over 30 pounds. It was not every day that there was something over 30 pounds that needed to be lifted at the customer counter, but whenever I needed help lifting something, I was given another employee to help me. Mostly I would just ask a man to help me and he would help me. I find that I can get plenty of help whenever I need it.

6. From sometime in November 2009 until sometime in January 2010, I was back at work at the customer counter, and then I was forced on leave again. During the time I was on leave, I was paid 75% of my regular pay as a Monday through Saturday driver through UPS's disability insurance.

7. About 3 months ago, I was released to full duty and went back to my driver job, I've been a full-time driver again for about 3 months now.

8. I have noticed that it is in UPS's discretion whether or not to accommodate a weight restriction. If you are injured, they have to accommodate you. Otherwise, your supervisor or manager decides whether to accommodate you.

9. Reggie Johnson is a driver who could not drive for a while for some reason I am unsure of. His manager accommodated him. Someone else drove for him for a while, and he delivered his packages.

10. I know two different male drivers who had some kind of addiction or needed rehabilitation of some sort, and they were accommodated by their managers by being given a driver for a while, and they delivered packages.

11. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

12. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson. Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

I state under penalty of perjury that the foregoing is true and correct.

Executed on July ___, 2010.
6/30/2010

/s/ Mia T. Lynch
Mia ~~Johnson~~ Lynch
Mia T. Lynch

STATEMENT OF CAROLYN L. ROBINSON

I, Carolyn L. Robinson, state that the following facts are true, according to my personal knowledge:

1. I was employed by Teamsters Local 315 from 1973 to 1998. I served as a business agent at that local from 1989 to 1998. Then I served as an international representative from 1996 to 1998. I co-chaired the IBT/UPS Safety and Health National Negotiating Committee in 1997. As a business agent I represented over 1,000 UPS workers in northern California. As an international representative, I was assigned to the small parcel division to co-chair safety and health negotiations and to assist members and business agents nationwide with safety and health issues. I was involved in hearing cases related to light duty requests due to pregnancy and also appeared at arbitration cases involving this issues. I also received numerous phone calls and letters from UPS employees protesting their unfair treatment by UPS when requesting light duty work during their pregnancies.

2. From my years of experience working with the Teamsters representing UPS employees, I learned that whether UPS will accommodate the pregnant employee who temporarily needs some type of alternate work or other accommodation due to a pregnancy-related condition depends entirely on the pregnant woman's supervisor or manager and whether that person wants to help the pregnant employee. When the supervisor or manager does not want to help the

employee, they refer the matter to the corporate office and then UPS says not to work them.

3. In 1997 I was the negotiator for the Teamsters on safety and health language. Jerry Gordanier was negotiating safety and health language for UPS. Others were involved as well.

4. In those negotiations, the Teamsters attempted to include in the CBA a provision that would have provided light duty to all employees who requested light duty as a result of a pregnancy-related condition. UPS rejected that proposal and rejected other proposals that clearly would have provided alternate work for all UPS employees who temporarily could not perform their regular jobs due to pregnancy-related conditions. In the end, UPS agreed to the language that was also continued in the 2002-2008 agreement at Article 16, Section 4:

> *Maternity and Paternity Leave*
>
> It is understood that maternity leave for female employees shall be granted with no loss of seniority for such period of time as her doctor shall determine that she is physically unable to return to her normal duties and maternity leave must comply with applicable state and federal laws.
>
> *A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable.*

5. I understand that UPS takes the position that the above-cited provision obliges UPS to provide

light duty or alternate work only to pregnant employees with doctor's certifications in the state of California. Although that was the best language that we could get UPS to agree to, the union's goal in negotiations was to protect pregnant UPS employees across the country and give them the right to temporary alternate work of the sort that drivers get when they have some medical condition that makes them lose their DOT certification.

6. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

7. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson. Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

I state under penalty of perjury that the foregoing is true and correct. Executed on September 2, 2010.

/s/ Carolyn L. Robinson
CAROLYN L. ROBINSON

STATEMENT OF ANTHONY SMITH

I, Anthony Smith, state that the following facts are true, according to my personal knowledge:

1. I worked at UPS, Inc. for 25 years. I worked as a full-time driver.

2. I was a shop steward while at UPS from 1979-2003. I am very familiar with the collective bargaining agreement that was in effect from 2002 through 2008.

3. Since 2004, I have been a representative of Teamsters Local 639 in Washington, D.C. One of the businesses where I represent union employees is UPS, Inc. in Chantilly, Virginia.

4. As far as I know, at UPS, the terms "light duty" and "TAW" or "temporary alternate work" are used interchangeably by the company and the union and the employees. When a UPS driver cannot drive for some period of time and is given a different job until he or she can drive again, everyone refers to what that employee is doing as "light duty."

5. There is a variety of different jobs that an employee on light duty can perform. Some of the jobs involve lifting over 20 pounds. Others don't involve lifting over 20 pounds. The pool of alternate jobs depends on what jobs are available, what the injury is, and what the employee's restrictions are. People have received light duty for on-the-job injuries or because they have other medical conditions.

6. In my experience, all employees in bargaining unit positions must be able to lift up to 70 pounds. However, some of the employees who hold bargaining unit positions usually do not have to lift over 20 pounds in order to do their jobs. Some of the available work that might not require an employee to lift over 20 pounds are scanners, small package sorters, some clerical positions and carwash positions.

7. The air driver positions generally deliver light-weight envelopes and packages although they occasionally may have to deliver heavier packages. The package drivers who deliver ground deliveries generally deliver heavier packages than the air drivers do.

8. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

9. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson. Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

10. I state under penalty of perjury that the foregoing is true and correct.

Executed on June 11, 2010.

/s/ Anthony Smith
Anthony Smith

STATEMENT OF CARVETTE WELCH

I, Carvette Welch, state that the following facts are true, according to my personal knowledge:

1. I have worked for UPS in Maryland for 20 years. The first 18 years was as a driver.

2. For some period of time, UPS put me on light duty because I had sprained my ankle. UPS put me in a job where all I had to do was answer phones. I did not have to lift anything heavier than 20 pounds. In fact, I did not have to lift anything heavier than the telephone.

3. On another occasion, I had a knee injury and UPS offered me a light duty job pumping gas. I would not have had to lift anything over 20 pounds in that job either. My doctor told me I had to keep my leg elevated, but UPS wanted me to come in and pump gas. UPS told me they would give me a chair to sit in so that I could pump gas, but it was impossible to pump gas without standing up so my doctor did not let me do that light duty job.

4. I have known other people at UPS who had doctors notes saying that they cannot work, but UPS tries to make them work anyway. One of these was very recent. I don't know the names of these people. There are many UPS employees who I know from work, but I don't know their names.

5. There are other jobs at UPS – such as clerical jobs and carwash jobs – that do not require the employee doing them to lift over 20 pounds. UPS may

say that people in those jobs have to lift over 20 pounds, but in reality, people in those jobs do not have to lift over 20 pounds.

6. When Tony Pender was still a UPS driver, before he became a business agent with the union, he had high blood pressure and could not drive because of it UPS put him on light duty when he could not drive. I remember him working in the building rather than going out on the roads.

7. John Cahill is another UPS driver who was given light duty by UPS when he could not drive due to high blood pressure.

8. Michael Hill, who also drives for UPS, was my roommate last year. During that time he could not drive for a while because he got a DUI. When he could not drive, UPS had him perform all of his regular duties, such as going on his route and delivering packages, except that UPS had assigned someone else to drive for him. I know UPS did the same thing with another driver who got a DUI, but I can't remember his name.

9. At UPS, it all depends on your supervisor or manager if you get light duty or not. If they want you to get it, you will. If not, you won't.

10. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

11. I told the things contained in this statement to Peggy Young's attorney, Sharon Fast Gustafson, Ms. Gustafson drafted this statement and gave me an opportunity to make corrections.

I state under penalty of perjury that the foregoing is true and correct. Executed on June 11th, 2010.

/s/ Carvette Welch
CARVETTE WELCH

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG Plaintiff, v. UNITED PARCEL SERVICE, INC., Defendant	)	Civil Action No.: DKC 08 CV 2586

STATEMENT OF PEGGY YOUNG

I, Peggy Young, am the Plaintiff in this case, and I state as follows, according to my own personal knowledge:

1. I have been working for United Parcel Service, Inc. ("UPS") since 1999. I have been a part-time driver for UPS since January 2002.

2. I work out of one of two UPS facilities across the street from each other in Landover, Maryland. The building I work out of is called the "D.C. Building". The building across the street is called the "Landover Building"

3. I work as a part-time air driver, which means that I deliver (generally lighter) packages sent by the more expensive "air" delivery rather than the (generally heavier) packages sent by the less expensive "ground" delivery. For several years, I have worked with Carol ("Cici") Richardson delivering packages to the Annapolis area on what is called the "Annapolis

route" (I did this same job at UPS before I took leave in 2006 and after I returned from leave in 2007.) Almost all of our deliveries in the Annapolis area are of envelopes – such as letters and paychecks – weighing much less than 20 pounds. I rarely if ever have to make a delivery of a package over 20 pounds in my UPS job. I feel, like I never have to do so, but I cannot swear that I have never done it. Because Cici has more seniority than I do, she is the one who divides up the deliveries between the two of us. She is the "lead man" because of her seniority, but that is an informal title. I have always deferred to Cici about which of us will be making which deliveries. If there ever is any heavy package, Cici insists on delivering it herself. This was especially true during the period when my husband and I were hoping that I would get pregnant, even before we attempted in vitro fertilization.

4. There are approximately 30 to 40 air drivers delivering packages for UPS from the D.C. Building every morning. Most of them deliver packages into D.C. Fewer of us deliver packages into Maryland. Approximately 20-some of them are part-time E.A.M. drivers ("early morning drivers") like me. The others are full-time combo-people or other people who do some other job at UPS and also make air deliveries in the mornings. Some of the combo-drivers drive part of the day and are clerks during the other part of the day.

5. Many, if not most of UPS's employees, both inside and outside of the building, are part-time

employees. Most of the part-time E.A.M. drivers have other part-time jobs outside of UPS like I do. Many of them are like me, working part-time at UPS for the great insurance benefits the job offers. We part-time air drivers earn a lower hourly wage than the full-time drivers. We maintain our employment benefits so long as we work 45 hours per month.

6. In 2005 I took a leave of absence from UPS when my husband and I were trying to conceive a child through in vitro fertilization. A few months later, I returned to work after a miscarriage. My UPS insurance benefits were cut off for a while during that absence, and I never understood why. This made me very cautious about making sure that I did not lose my benefits during future leaves of absence.

7. In early 2006, I took another three week leave of absence for another IVF attempt that failed.

8. Sometime after one of these early IVF attempts, I spoke with Carol Martin when she was in the P.C. Building about how my insurance had been cut off. She told me that in the future, I would need to turn in a request for FMLA leave at the beginning of my leave and then bring in a doctor's note with my restrictions when I returned to work.

9. Beginning in or about late July 2006, I was again on leave related to an attempt to conceive a child through in vitro fertilization. (Originally I had expected to be out beginning approximately July 15, but I think I ended up taking leave close to the end of that month.)

10. All of these leaves of absence related to my IVF procedures were unpaid unless. I happened to have accrued paid leave that I had not yet used.

11. Because I was concerned about protecting my right to medical and disability insurance, between July 15, 2006, and November 6, 2006, I placed at least 11 telephone calls to my employer in an effort to obtain information about my disability and health insurance benefits and to learn what I needed to do to make sure that I continued to receive coverage under UPS's healthcare program. I left messages for Ursula Blunt, my supervisor; for Carol Martin, who is called the UPS nurse, but whose job title I understand to be "occupational health manager"; and for the union. I also tried to reach the HR office many times, but I never reached anyone there. That office is staffed only a few hours each morning and it is almost impossible to catch anyone there.

12. One of the questions that I kept asking was when I needed to return to work in order to preserve my benefits. (I would have returned to work at any time that I needed to return in order to keep my health and disability benefits. I had originally anticipated returning to work around August 26, but then my leave started later than I had originally anticipated and I found out a few days before August 26 that I was pregnant. I preferred being out of work for the first couple of months of my pregnancy because my doctor suggested it, and I believed it gave me the best chance of carrying the pregnancy to term.)

13. Most of my calls to UPS were never returned, and I could not get solid answers to my questions. Many of my calls to UPS requesting information about my benefits and when I needed to return to work were ignored. As to the others, I was simply given the runaround about whom I should talk to between UPS and Aetna, the health insurance company that administered UPS's plan.

14. I asked my doctor for a letter with my restrictions on it around September 13, 2006, because I had not yet gotten an answer to my question about when I needed to return to work, and I was concerned at that time that I might have to go back soon. I gave it to Ursula or someone else at UPS to give to her, but I was not hoping to return to work yet, I was still trying to get permission to extend my leave.

15. Sometime after receiving the September 13 letter, I spoke to Carol Martin about how long I could extend my leave. She gave me the impression that UPS did not care when I returned to work but, she reminded me, that when I did return I needed to bring in a. doctor's note stating what my restrictions were.

16. At my October 11, 2006, doctor's appointment, I had a very encouraging ultrasound. I was feeling good about the pregnancy and ready to return to work. My doctor released me to return to work. (My medical record from that doctor's visit is attached as exh. 1.) Because it had been nearly a month since my last doctor's note and I was concerned that that

note was now too old to use, I again told my doctor that my employer required a note stating my restrictions in order for me to return to work.

17. My doctor at the National Naval Medical Center gave me a note (exh. 2) that stated:

> Peggy Sue Young is currently pregnant and due to deliver on or about May 2, 2007. Due to her pregnancy it is recommended that she not lift more than 20 pounds. Should you need any further information or have questions, you may contact me at the above telephone number or email me at cbshawl@bethesda.med.navy.mil.

18. On or soon after October 11, 2006, I attempted to return to work. I gave the October 11, 2006, doctor's note to my supervisor, Ursula Blunt. She read the note and told me she would see if there was a light duty job for me in the building. I told her that I could do a light duty job or I could just return to my regular job because I never had to deliver heavy packages in my regular job.

19. Sometime after I gave Ursula the October 11 note, she told me that needed to talk to Carol Martin. On or about October 20, 2006, I called Carol Martin and faxed her a copy of the October 11, 2006, doctor's note. Carol Martin told me that I could not work because UPS did not give light duty for pregnancy but only for workplace injuries. I told her that it would not be a problem for me to continue to perform my regular job because I did not need to deliver

heavy packages in my regular job. I explained that all of my deliveries were of packages under 20 pounds and that if a heavy package came along, Cici could deliver it or, if I needed to, I would deliver it. I said I would be happy to do a different job or my regular job. She said that she did not think I would be permitted to work because of my doctor's note.

20. I was very upset when Ms. Martin said I could not continue to perform my regular job. I explained to Ms. Martin how important it was that I keep my job so that I could keep my benefits. She said she was sorry, but she did not know what to do. She seemed confused. She said that I did not qualify for short-term disability coverage because my doctor did not say I was fully disabled. She suggested that I ask my doctor to give me a note saying that I could not work at all, I thought that would have been a lie because I could work.

21. In this same conversation, Ms. Martin said I needed to think about my job with UPS because I was pregnant and I had used up my FMLA leave. She was clearly suggesting that I should quit my job because I was pregnant. I did not think UPS could make me quit my job because I was pregnant when I knew I could continue to perform my job.

22. (I understand that Carolyn Martin has testified in this case that she told me that I would not or may not qualify for disability benefits because it was very early in my pregnancy. I do not remember

her making that statement, but I cannot swear that she did not also say that.)

23. Ms. Martin did not give me the impression that she was making any decision when we spoke. She was only announcing what she understood about UPS policy and telling me how confused she was about it. I still believed after that conversation that Ursula Blunt or Myron Williams who was the manager of the whole building where I worked – would let me work.

24. (I have previously misstated the October 11, 2006, date referred to above as "September 2006" because I was working from memory and mistakenly thought that I received an October 11, 2006, letter from my doctor in September rather than October.)

25. After my conversation with Carol Martin, I kept trying to get Ursula Blunt to return my calls and tell me I could come back to work. She never returned my calls.

26. In early November 2006, I went into the building and talked with Myron Williams. He was the top person at my jobsite. I knew he could let me work (even though Tony Pender at the union had told me that Myron Williams had told him that UPS did not want me in the building while pregnant because I was too much of a liability). When I explained my situation, Mr. Williams told me the same thing. He said I could not come back in the building until I was no longer pregnant because I was too much of a liability. I told Myron Williams the same thing I had

told Carol Martin: My doctor had recommended that I not lift more than 20 pounds, but that would not prevent me from doing my regular job. I just delivered letters and light-weight envelopes. I could not remember the last time I had to deliver more than 20 pounds. Besides, Cici Richardson who delivered packages with me on the Annapolis route – had told me and my supervisor that she would make certain that I never had to deliver packages over 20 pounds. Even if I did have to lift something over 20 pounds, I would be able to do it. If they wanted to put me on a desk job that would be fine with me, too. I told him how much I needed my pay and benefits. I practically begged for my job back.

27. I believed I was being discriminated against because of my pregnancy, and I was beside myself over this. I could not think straight. I felt sick to my stomach and experienced bad indigestion. I was very, very worried about our finances because we were getting behind financially. I experienced trouble sleeping at night. When I woke up, this was the thing on my mind. I was emotionally very fragile and found it harder not to be short-tempered with my older children. My husband and I had been hoping to have a baby for a long time. What should have been a very happy pregnancy was instead one of the most stressful times of my life.

28. I could have done my regular job, and I knew there were plenty of other jobs at UPS that I could have done as well I had seen other drivers temporarily doing other jobs that did not require

lifting over 20 pounds. I knew that drivers who can't pass their D.O.T. (Department of Transportation) tests are given light duty jobs until they can pass the D.O.T. tests. At UPS the terms "light duty" and "alternate work" are used interchangeably, but mostly we just call it light duty whenever a driver can't do his regular driver job for some reason and is given other work to do – usually in the building or at the carwash.

29. There are all sorts of these "light duty" or "alternate duty" jobs at UPS that do not require an employee to lift more than 20 pounds. These are some of these jobs that I have observed:

- Some employees just scan bar codes on packages. They don't lift the packages. The packages roll past the employees on rollers.
- Some employees key in bad addresses into a computer and make tags or labels for address corrections. They are called "AC Clerks" which stands for "address correction clerks"
- There are many clerical employees who do desk jobs. They are in the same bargaining unit as I am. Some of the combo drivers are clerks part of the day and drivers part of the day.
- There are employees who just sort "smalls". Smalls are packages that are supposed to fit through a coat hanger. They do not weigh over 20 pounds. (A "pick off man" further up the line picks off any package that is too

large and puts it on the main belt to be shot back up to the regular guys to go through the main system to the trucks. The smalls are sorted into small bins. The smalls sorters never have to lift heavy weights. The baggers on the other side have to lift the bags.)

- The day call workers takes the smalls out of a tote and call telephone numbers to learn where the packages should be delivered.
- Employees in the car wash drive the vehicles through the sprayers. The rollers automatically catch the vehicles. The employee just sits there.
- Other employees come in on Fridays and Saturdays to move trucks and vans into and out of parking spaces for the carwash.
- The K Street Building is a "go-between" building that is sort of an extension of UPS's DC Building. UPS employees called "Walkers" at the K Street Building just walk around picking up packages close to the K Street Office. Many of these packages weigh less than 20 pounds. Someone with a 20-pound weight restriction could be sent out for many of these pickups.
- The K Street Building has its own small sorters as well.

30. I would have been willing to do any of these jobs or other jobs like these at UPS when I was pregnant. I only needed to work 45 hours per month

to keep my health insurance. But UPS insisted that I go home until I was no longer pregnant.

31. I have known UPS employees who were given light duty or alternate duty for reasons that did not relate to on-the-job injuries. Three such employees whom I personally observed temporarily doing light duty jobs for reasons other than job-related injuries are these:

32. Quatrice Pendleton, an African-American UPS air driver on our shift, was given light duty when she was pregnant. This was around the time that I came back from maternity leave. Quatrice had been driving a vehicle called a "power horse" When she became pregnant, Bill Riggins, our supervisor, moved her to a minivan and reassigned any heavy packages to other drivers. (It was not uncommon for heavy packages to be reassigned to another driver if one driver had a problem for a while.) I heard at least one other employee complaining about having to take Quatrice's heavy packages for her.

33. Charles Cox is an African-American UPS air driver who was on light duty for a while because he had high blood pressure and could not pass his D.O.T. exam. He kept coming to work, but he was no longer wearing his driver uniform. He told me that he was on light duty because of his high blood pressure and he did not know how long it would be before he could drive again.

34. Mia Johnson, another African-American UPS air driver, also failed her D.O.T. exam because of

high blood pressure. She told me that high blood pressure was the reason she had to be on light duty. She also said she cussed out the doctor who wouldn't let her pass the D.O.T. test. She was working but no longer wearing her driver uniform.

35. Pat Arline-Young, is an African-American air driver, who hurt her foot and was put on light duty office work for at least a month because of it.

36. In addition to my personal observations about UPS drivers who were temporarily given light duty or alternate work, I have heard of other UPS drivers who were similarly accommodated when they temporarily could not do their driver jobs, including:

- Kevin Barber who was given light duty when he could not pass his DOT test because of high blood pressure;
- Tina Butler (African-American) who was permitted to reduce her work schedule and not come in when she did not want to because of pregnancy-related health problems;
- Kim Campbell who was put on light duty sweeping out trucks for a while;
- Brandon Greening who was put on light duty for a while after undergoing chemotherapy treatment for cancer;
- Regina McNair who was allowed to work as a clerk when she was sick;

- Eric Shifflett who was on light duty for a while due to a deteriorating condition in his back and knees;
- Harry Shipman who was on light duty after an injury;
- Several UPS drivers (one named Rick) who were given light duty when they could not drive for a while due to convictions for DWI – driving while intoxicated; and
- Tammy Gatton who was accommodated with a special truck and platform to use because of her broken leg.

37. Soon after I first returned to work, I spoke with Kevin Brodas who was a UPS supervisor in the Annapolis Center in the Landover building across the street from the building where I worked. We talked about my absence from work, and I told him what had happened to me with the doctor's note and me not being permitted to work. Kevin told me that if he had been my supervisor, he would have found work for me to do.

38. I lost all the pay I should have been receiving beginning October 11, 2008. I did not know when my medical coverage would end. Eventually, I learned that my medical coverage ended at the end of 2006.

39. One of the primary reasons I work at UPS is for the benefits. I have worked many part-time jobs in my life, and this is the only part-time job I have ever found that provided good benefits. I did not look for another job for several reasons: I did not have the

emotional strength to look for a job or train for a new position because of how depressed I was from being told I had to go home until I was no longer pregnant. Also I knew I would be going back to my UPS job as soon as I could after the pregnancy. It did not make sense to look for a job and train for a job when I was going to have to be taking maternity leave so soon. (By the time Myron Williams told me not to come back to the building until I was no longer pregnant, I was looking pregnant, and it's very difficult to get hired when you're looking pregnant.) And mostly, I knew from experience that I would not be able to find another part-time job with the benefits that I had at UPS.

40. I was able to receive healthcare benefits through my husband's military medical insurance, but those benefits are far inferior to what I should have been receiving through my UPS plan with Aetna. That is the reason I had elected to pay for coverage through UPS for the entire family even though it would have been cheaper for me to rely on my husband's military coverage.

41. My UPS plan was superior to my husband's plan in terms of the choice of doctors that I had. I could have used a civilian doctor and developed a doctor-patient relationship with the doctor who assisted me during labor. With the military plan, there were so many different doctors that I ended up seeing that I was not able to get to know any one doctor at all. Military medical care has earned a reputation of being very impersonal.

42. My UPS insurance also would have permitted me to use Anne Arundel Medical Center which has a maternity ward with an excellent reputation and is only 20 minutes from my house. This made a huge difference in the time it took me to get to medical appointments. With my husband's insurance, I had to receive medical care either at Andrews AFB or at Bethesda Naval Hospital. I heard that the medical care at Andrews was even worse than that at Bethesda, so I received my care from Bethesda. I typically had to leave the house for appointments at 6:15 or 6:30 in the morning and spend 1.5 to 2 hours traveling to the doctor. The time it mattered most though was that with the coverage I should have had through UPS I would have had a much shorter trip to the hospital when it came time to give birth to my baby.

43. If I could have relied on my Aetna plan through UPS, I would have used civilian doctors and Anne Arundel Medical Center. However, UPS had dropped my insurance coverage multiple times, without any explanation, and I therefore could not rely on them for my maternity coverage, even when I was theoretically eligible to be covered. I had worked hard to learn everything that I needed to learn to be certain that I would maintain my Aetna coverage through UPS throughout my pregnancy, but I was unable to receive that assurance. I was still working on it at the time that I learned that my healthcare coverage had been cut off once again.

44. I did not sign up for COBRA coverage through UPS because it was over $900 per month and far too expensive for us.

45. In January 2007 I received a copy of my attendance report, which showed that I was treated as on "Disability" during my absence. (Exh. 3 is an Attendance Report showing me coded as out on "Disability" beginning November 17, 2006.) I thought it was wrong that they said I was on "Disability", and they were treating me like I was disabled, but they would not permit me to receive short-term disability coverage (which would have permitted me to continue my UPS health insurance). Once I learned this, I promptly filed a claim for disability payments for the time that I had been out of work. I prepared the claim myself (without the help of a lawyer). I did not have any plan documents when I prepared the claim.

46. Despite my "Disability" status with UPS, the Plan ruled that I was not eligible for disability payments, because (it ruled) my claim had not been submitted on time. Of course, the reason for delay in submitting my claim was that Carol Martin had told me I would not be able to receive short-term disability benefits because my doctor did not say I was fully disabled.

47. When the UPS healthcare plan denied my claim for benefits because they said it was filed too late, I called Carol Martin and reminded her that she was the one who told me that I did not qualify for short-term disability benefits and that was why I had

not filed earlier. Carol Martin told me that if I sent her a copy of my appeal letter, she would try to help me get disability coverage. I sent her a copy of the letter in February 2007 by email (exh. 4) and asked her to help, but a couple of weeks passed and she would not do anything to help me with it or even return my calls.

48. In March 2007, I appealed the denial under the Plan's procedures, and my claim for benefits was again denied, and I was told it was a final decision. (Exh. 5.)

49. In April 2007, I was distraught over my need for my employment benefits and my inability to obtain them, I did not have any of the plan documents, and I did not know what to do. I therefore sought legal counsel in April 2007 to attempt to obtain information about the UPS benefits plan. I consulted with attorney Sharon Fast Gustafson and we began making requests for plan information at that time. (No relief is sought in the current lawsuit with regard to any late receipt of plan documents.)

50. I gave birth to my daughter Triniti on 04-29-2007. I was not able to return to work for some period of time following the birth due to the time it took me to recover from physical conditions related to pregnancy and childbirth. I felt nearly recovered from the pregnancy and childbirth by June 26, 2007, and I returned to work at that time.

51. No one at UPS asked me for any doctor's note when I returned to work following my pregnancy.

52. On July 23, 2007, UPS sent me, in care of my attorney, a summary plan description for the UPS Health Program. (Exh. 6 contains selected pages.) It was from my attorney's review of that document that I first learned that I had been entitled to a second level review of my denial of short-term disability benefits, but by the time I learned this, it was too late to file the second level appeal.

53. It was also from that document (exh. 6, D000066) that I learned that the UPS Health Program provides short-term disability ("STD") benefits for injured or ill employees who "are unable to perform the material and substantial duties of [their] regular UPS occupation" (with no requirement of full or total disability) and that "STD benefits begin on the first day of a disability due to an accidental injury or the eighth day of a disability due to illness or pregnancy" (D000066.) Although the plan document claims to treat pregnancy the same as illness, according to UPS occupational health manager Carolyn Martin, UPS's Plan did not permit STD benefits for pregnant woman unless the woman had a doctor's note saying she was fully disabled. (Ms. Martin blamed Aetna for this requirement, but UPS's STD plan was self-insured by UPS, and the UPS Claims Review Committee was the final decisionmaker regarding claims for STD benefits.) (Exh. 6, D000105.)

54. As of October 11, 2006, I was "unable to perform the material and Substantial duties of [my] regular UPS occupation", but only because UPS would not permit me to perform them.

55. On July 23, 2007, I filed a charge of discrimination with the EEOC for pregnancy and disability discrimination. (Exh. 7, Charge and EEOC form indicating date of receipt.)

56. In January 2008, I added a claim for race discrimination (exh. 8) when I learned that two African-American women, Quatrice Pendleton and Tynette Williams, were permitted to work light duty for some period when they were pregnant. (See exh. 9, statement of Tynette Williams.) I am Caucasian, but by far the majority of UPS employees at the D.C. building are African-American, including my supervisors and managers.

57. On July 21, 2008, the EEOC sent us a copy of UPS's position statement filed with that agency. (Exh. 10, cover letter and selected pages.) The copy the EEOC sent to us did not include any attachments. The position statement said that UPS gave light duty in only two situations: where an employee was injured on the job or where someone had a [permanent] disability under the Americans with Disabilities Act.

58. On September 2, 2008, the EEOC issued me a Notice of Right to Sue. (Exh. 11.)

59. On October 3, 2008, I filed the lawsuit in this case. (Exh. 12, Complaint's caption page.)

60. After filing the lawsuit in this case, we received the EEOC file in this case, including a copy of the position statement and attachments that UPS had filed with the EEOC. UPS had attached only

certain pages from the collective bargaining agreement to make it appear that UPS gave "alternate work" – which UPS referred to as "light duty" – only for on-the-job injuries (and permanent disabilities under the Americans with Disabilities Act). (Exh. 13, selected pages of UPS position statement to EEOC.)

61. During discovery in this case, we received from UPS the full copy of the collective bargaining agreement showing the many different reasons that light duty or "alternate work" is permitted at UPS, including several reasons related to temporary conditions that are not caused by on-the-job injuries and that cause UPS drivers to temporarily be unable to perform their driving jobs. (Exh. 14, selected pages of collective bargaining agreement.)

62. I have filed my EEOC charge and brought this lawsuit for two reasons: (1) I want justice to be done for the pregnancy discrimination that I suffered at UPS, and (2) I want to help correct this problem of pregnancy discrimination at UPS so that women at UPS who become pregnant in the future will not be discriminated against like I was. If they can perform their regular jobs, they should be permitted to do so. If they cannot, they should be permitted to do another job, the same way that people who need other jobs because of their temporary high blood pressure or vision problems are permitted to have them. If they cannot work at all due to pregnancy-related conditions even early in their pregnancies, I want them to be given short-term disability benefits the same way

other injured or ill employees are given those benefits.

63. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify in any court of law.

64. I told the things contained in this statement to my attorney, Sharon Fast Gustafson, who drafted this statement and gave me opportunities to make corrections.

I state under penalty of perjury that the foregoing is true and correct.

Executed on June 3, 2009.

/s/ P. Young
PEGGY YOUNG

SUPPLEMENTAL STATEMENT OF PEGGY YOUNG

I, Peggy Young, am the Plaintiff in this case, and I state as follows, according to my own personal knowledge:

65. My only driving position at UPS was as an EAM Air Driver. I was never a "package driver" Package Drivers deliver heavier packages than Air Drivers do.

66. During 2005 and 2006 when I was an EAM Air Driver on the Annapolis route, I was not asked to deliver other routes. I delivered approximately 5 to 20 deliveries each day, consisting almost exclusively of letter envelopes that generally weighed under a pound (usually just a few ounces) each. All of my deliveries for a single day weighed less than 20 pounds combined and sat beside me on the front passenger seat. As part of my regular job at that time, I did not load or unload vans. If I did so, it was voluntary. If I had needed to lift up to 70 pounds during this period or during my pregnancy, I could have done so.

67. UPS never asked me – when I first started work, or at any time after that – if I could lift up to 70 pounds, and I was never given a test to show that I could lift up to 70 pounds. I would have taken such a test in 2006 to prove that I could do so in order to keep my job.

68. If UPS had permitted me to work while pregnant, I would have worked at UPS up until I gave birth, as I did with my prior pregnancy.

69. During my employment with UPS in Maryland beginning in 2002, I never loaded or unloaded packages onto or off of an airplane nor did I seek the security clearance that was required to do so.

70. During my employment with UPS I was never disciplined or given a reprimand, prior to my filing a Charge of Discrimination with the EEOC.

71. Prior to my filing a Charge of Discrimination with the EEOC, I never had one injury or filed one worker's compensation claim, and I never asked for one day of light duty or alternate work before my requests in October and November 2006 that I be permitted to do light duty if UPS would not permit me to do my regular job.

72. I am over 18 years of age, have never been convicted of a felony, and am otherwise fully competent to make this statement and to testify, in any court of law.

73. I told the things contained in this statement to my attorney, Sharon Fast Gustafson, who drafted this statement and gave me opportunities to make corrections.

I state under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2010.

/s/ P. Young
PEGGY YOUNG

[SEAL] **National Naval Medical Center**
Department of Obstetrics mad Gynecology
8901 Wisconsin Avenue
Bethesda, MD 20889
301-295-5552, Fax: 301-319-8276
Mother and Infant Care Center 301-319-5000

1200/132A

October 11, 2006

To Whom It May Concern:

Peggy Sue Young is currently pregnant and due to deliver on or about May. 2, 2007. Due to her pregnancy it is recommended that she not lift more than 20 pounds.

Should you need any further information or have questions, you may contact me at the above telephone number or email me at cbshawl@bethesda.med.navy.mil

Sincerely,

/s/ C. Shawl CNM 25th

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

SUPPLEMENTAL DECLARATION OF CAROLYN MARTIN

I, Carolyn Martin, do hereby depose, affirm and state as follows:

1. I am over 21 years of age. I have personal knowledge of, and am competent to testify to, the matters stated in this Supplemental Declaration.

2. I treated Peggy Young exactly the same as I treated any male driver who, as the result of an off-the-job injury or medical condition, presented with medical documentation recommending that he not lift more than twenty pounds. I would not, and did not, provide any such male driver light duty or any other accommodation, and he would be placed on a leave of absence.

3. I regarded lifting more than twenty pounds to be an essential function of the job of a delivery driver, including an Air Driver, If a male delivery

driver, including an Air Driver, had presented a health care provider's recommendation that he not lift more than twenty pounds, I would have concluded that he was not able to perform the essential functions of his driving job. I did not, and would not, permit any delivery driver, including an Air Driver, who presented with a health care provider's recommendation that he not lift more than twenty pounds to work as a delivery driver.

4. In deciding that Peggy Young was not eligible for light duty and that she was not qualified to return to her regular job as an Air Driver because of the twenty-pound lifting restriction/recommendation from her health care provider, I did not communicate with or otherwise consult with Myron Williams.

5. I have never investigated the weights of packages that non-pregnant drivers delivered. If a male employee presented with a lifting restriction/recommendation as the result of an off-the-job injury, I would have relied on the Essential Job Functions of his position in determining whether the lifting restriction/recommendation rendered him unable to perform his job.

6. When Peggy Young was pregnant and expressed an interest in returning to work in a light duty position, I never saw or was made aware of any medical documentation stating that she was released to return to work without limitations.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief

Date: 11/3/10 /s/ Carolyn Martin
Carolyn Martin

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF JAMES LOTT

I, James Lott, do hereby depose, affirm and state as follows:

1. I am over 21 years of age. I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration.

2. I have been employed by UPS since 1980. For twenty-three years I have been employed in various Human Resources positions, including as District Human Resources Manager. From August 2005 to April 2010, I served as the District Human Resources Manager for the Metro D.C. District. When I initially assumed that position in August 2005, the Metro D.C. District included Northern Virginia, the District of Columbia, and parts of Maryland, including Montgomery County and Prince George's County, Maryland. The Metro D.C. District subsequently was expanded to include the entire State of Maryland, as

well as Delaware. At all times during my tenure as the District Human Resources Manager, the Metro D.C. District included the UPS facility in Landover, Maryland, which is referred to as the "D.C. Building."

3. As the District Human Resources Manager, I was the highest level Human Resources official in the Metro D.C. District. Other Human Resources Managers, including the Occupational Health Manager, Carol Martin, reported to me.

4. The Metro D.C. District consisted of a number of divisions, including the Capital Division. Myron Williams previously served as the Capital Division Manager.

5. As the Capital Division Manager, Mr. Williams did not exercise authority over the entire Metro D.C. District; he did not have any district-wide responsibilities.

6. Neither Mr. Williams nor any other Division Manager or other supervisor or manager in the operation had the authority to determine whether an employee could perform the essential functions of his/her job notwithstanding a medical restriction/recommendation. They also did not have the authority to grant light duty or make a similar accommodation for an employee who, as a result of an off-the-job injury or illness, had a lifting or other restriction/recommendation that rendered him/her unable to perform the essential functions of his/her job. If a supervisor or manager granted such an accommodation for an off-the-job injury or illness that did not

rise to the level of a disability within the meaning of the ADA, that would be contrary to Company policy, and if I learned that was being done, I immediately would put an end to it.

7. As the Occupational Health Manager for the Metro D.C. District, Carol Martin was responsible for dealing with employees who had lifting or other restrictions/recommendations regarding their ability to work where the restrictions/recommendations did not arise from an on-the-job injury. Among other things, Carol Martin, sometimes in concert with her Region Occupational Health counter-parts, would be responsible for determining whether the employee's restrictions/recommendations rendered him/her unable to perform the essential functions of his/her job. If the employee was unable to perform the essential functions of his/her job as a result of an off-the-job injury or illness that did not rise to the level of a disability within the meaning of the ADA, the employee would not receive light duty or an alternative work assignment and would be required to take a leave of absence until the restriction was removed and the employee was able to perform the essential functions of his/her regular job.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: 11/4/2010 /s/ James Lott
James Lott

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF MYRON WILLIAMS

I, Myron Williams, do hereby depose, affirm and state as follows:

1. I am over 21 years of age. I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration.

2. I have been employed by United Parcel Service, Inc. ("UPS") since 1985. I served as the Capital Division Manager from June 2006 to October 2007. The Capital Division was a division of the former Metro D.C. District. As the Capital Division Manager, I did not exercise authority over the entire Metro D.C. District, and I did not have any district-wide responsibilities.

3. When I was the Capital Division Manager, the Capital Division included only a UPS facility in Landover, Maryland, which is referred to as the "D.C.

Building." Accordingly, as Capital Division Manager, I managed only the D.C. Building.

4. I never told Peggy Young that she needed to go home until she was no longer pregnant because she was too much of a liability, nor did I make any other comment to that effect. I have never made such a comment to any employee.

5. As the Capital Division Manager, if an employee had a medical restriction or his/her physician had made a recommendation that the employee should not perform a certain activity, I did not have the authority to determine whether that employee was able to perform the essential functions of his/her job notwithstanding that restriction/recommendation. I also did not have the authority to grant light duty or make a similar accommodation for an employee who, as a result of an off-the-job injury or illness, had a lifting or other restriction/recommendation that rendered him/her unable to perform the essential functions of his/her job.

6. As the Capital Division Manager, I never made the decision whether an employee who had a medical restriction or a recommendation from his/her physician that the employee not perform a certain activity could perform the essential functions of his/her job notwithstanding that restriction/recommendation, I also did not grant light duty or make a similar accommodation for an employee who, as a result of an off-the-job injury or illness, had a lifting or other restriction/recommendation that

rendered him/her unable to perform the essential functions of his/her job.

7. As the Capital Division Manager, I never allowed a male employee to work when that employee, as a result of an off-the-job injury or illness, had a lifting or other restriction/recommendation that rendered him unable to perform the essential functions of his job.

8. I had absolutely no involvement in making the decision regarding whether Peggy Young was entitled to light duty or any other accommodation when she was pregnant or in making the decision regarding whether Ms. Young could return to work in her regular position as an Air Driver when she was pregnant.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: 11-4-10 /s/ Myron Williams
Myron Williams

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG, **Plaintiff,** **vs.** **UNITED PARCEL SERVICE, INC.,** **Defendant.**	**Civil Action No. DKC 08 CV 2586**

DECLARATION OF ERIC BRINGE

I, Eric Bringe, do hereby depose, affirm and state as follows:

1. I am over 21 years of age. I have personal knowledge of, and am competent to testify to, the matters stated in this Declaration.

2. I have been employed by United Parcel Service, Inc. ("UPS") for 31 years. I have been a Labor Manager for UPS for the last 12 years. From November 2004 until April 2010, I was a Labor Manager for UPS's Metro D.C. District. Since April 2010, I have been a Labor Manager for UPS's New Jersey District. As a Labor Manager, it is my responsibility to be intimately familiar with the collective bargaining agreement ("CBA") between UPS and the Teamsters Union.

3. The CBA requires UPS to temporarily provide inside work to drivers who are physically able to

perform inside work but who are not permitted to drive because they: (1) failed the Department of Transportation ("DOT") examination or are otherwise medically disqualified from driving (Article 20, Section 4); (2) have lost their driver's license (Article 16, Section 3 and Article 67, Section 3); or (3) have been involved in a motor vehicle accident and are not permitted to drive while UPS investigates the accident (Article 18, Section 3). A pregnant driver who falls within one of these provisions of the CBA and who is physically able to perform inside work would be provided inside work to the same extent as her male counterpart. Article 20, Section 4; Article 16, Section 3; and Article 67, Section 3 apply to full-time drivers only.

4. The CBA does not permit a part-time bargaining unit employee to "bump" or displace a full-time employee.

5. A combination job at UPS is a full-time job that combines two part-time positions. Employees bid on combination jobs, which are awarded based on seniority.

I hereby affirm under penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge, information and belief.

Date: November 8, 2010 /s/ Eric Bringe
Eric Bringe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG	:	
v.	:	Civil Action No.
UNITED PARCEL SERVICE, INC.	:	DKC 08-2586
	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this employment discrimination matter is a motion for reconsideration (ECF No. 101) filed by Plaintiff Peggy Young. Because the issues have been fully briefed and no hearing is necessary, the court now rules. *See* Local Rule 105.6. For the reasons that follow, the motion for reconsideration will be denied.[1]

I. Background[2]

Plaintiff Peggy Young first filed this suit on October 3, 2008. Later that month, Young amended her complaint to assert claims against only Defendants

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[1] Young has also moved for leave to file a surreply to UPS's bill of costs. (ECF No. 111). The motion will be granted.

[2] The background of this case is discussed at greater length in the court's earlier memorandum opinion on summary judgment. *See Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at *1-7 (D.Md. Feb. 14, 2011), ECF No. 99.

United Parcel Service of America, Inc.[3] and United Parcel Service, Inc. ("UPS"). (ECF No. 4). The amended complaint alleged violations of Title VII, the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), and Section 1981. The claims largely concerned the treatment she allegedly received from UPS during the course of her pregnancy in late 2006 and early 2007.[4]

On July 31, 2010, UPS moved for summary judgment on all counts of the amended complaint. (ECF No. 60). After full briefing from the parties, including briefing that exceeded the standard page limits, UPS's motion was granted on February 14, 2011. (ECF Nos. 99, 100). Young moved on February 23, 2011 for partial reconsideration of that summary judgment order, contending that the earlier decision did not address one aspect of her ADA claim. (ECF No. 101). UPS opposed shortly thereafter; Young has also filed a reply. (ECF Nos. 104, 109).

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[3] By stipulation of the parties, Defendant UPS of America, Inc. was dismissed on December 17, 2008. (ECF No. 14).

[4] Young attempted to file a second amended complaint in June 2009 that, among other things, tried to add a new disparate impact claim under the Pregnancy Discrimination Act. Young contended that claim had already been pled in the first amended complaint. (ECF No. 30, at 6). The court disagreed and refused to allow her to add the new claim. (ECF No. 43, at 15).

II. Analysis

Young does not state which Federal Rule of Civil Procedure she relies upon in bringing her motion for reconsideration. The court will construe it as a Rule 59(e) motion, as it was filed within the time limits for bring a Rule 59(e) motion and "call[s] into question the correctness of that judgment." *MLC Auto., LLC v. Town of S. Pines,* 532 F.3d 269, 280 (4th Cir. 2008); *accord Katyle v. Penn Nat'l Gaming, Inc.,* 637 F.3d 462, 471 n.4 (4th Cir. 2011); *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 411-12 (4th Cir. 2010). Generally speaking, there are three limited grounds for granting a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct clear error of law or prevent manifest injustice. *See Sloas v. CSX Transp. Inc.,* 616 F.3d 380, 386 (4th Cir. 2010). Such a motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998) (quotation marks omitted)). And, of course, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (quotation marks omitted).

Without saying so, Young would seem to rely on the third basis for Rule 59(e) relief – preventing "manifest injustice." In support, she contends that the court improperly overlooked one part of her ADA claim. In particular, Young says the court failed to

address her claim that UPS refused to allow her to return to her regular job because it regarded her as disabled. This latest iteration of her ADA claim would seem to be yet another attempt to re-characterize the issues and arguments in this case. Her opposition to summary judgment framed her complaint as advancing two ADA-based claims: a medical inquiry claim and a failure to accommodate claim.[5] (*See* ECF No. 76-1, at 52 ("The first of the ADA issues "); 53 ("The second ADA issue in this case ")). Nevertheless, Young insists that this argument is not new because her second claim – which on its face asserted only a failure to accommodate claim – actually comprised two claims, including a claim that UPS discriminated against Young in refusing to allow her to return to work. *But see Shin v. Univ. of Md. Med. Sys. Corp.*, 369 F.App'x 472, 479 (4th Cir. 2010) (distinguishing between failure to accommodate claims and denial of employment opportunity claims under the ADA). UPS responds that this new argument was not raised in the administrative process before the Equal Employment Opportunity Commission and, in any event, fails on its merits.

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[5] The complaint is little help, as Young does not separate out the various claims therein. *See, e.g., Young v. United Parcel Serv. of Am., Inc.*, No. DKC 08-2586, 2010 WL 1346423, at *6 (D.Md. Mar. 30, 2010) ("Plaintiff's complaint is not a model of clarity. . . . Plaintiff's first amended complaint . . . is not divided into separate counts or claims.").

UPS is correct that no manifest injustice must be rectified here, as Young's argument fails on its merits. Although Young attempts to establish her claim via both direct evidence and the pretext framework, she has done neither.

First, Young has not presented direct evidence of discrimination. As the court recognized in its prior opinion, the ADA prohibits discrimination against "a qualified individual on the basis of disability." 42 U.S.C. 12112(a). Young argues (in a footnote argument) that there is direct evidence of disability-based discrimination. In particular, Young contends that UPS has now admitted that it sent her home because "it mistakenly believed her to be impaired and unqualified to perform *her job*." (ECF No. 109, at 14 n.9 (emphasis added)). Even if that were true, that fact is not direct evidence. There is a difference between being regarded as disabled – that is, being regarded as "substantially limited in a major life activity" – and being regarded as unable to a perform "a particular facet of a particular job." *Rohan v. Networks Presentations LLC,* 375 F.3d 266, 277 (4th Cir. 2004) (quotation marks omitted); *see also Welsh v. City of Tusla, Okla.*, 977 F.2d 1415, 1419 (10th Cir. 1992) (listing cases establishing that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the [ADA]"); *accord Christensen v. Titan Distrib., Inc.*, 481 F.3d 1085, 1093 (8th Cir. 2007). The latter does not warrant relief under the ADA. At

most, that is all that Young has established with her purported direct evidence.

Second, Young has not proven her case via the pretext framework. To prove a case of disability-based discrimination under that approach, an employee must show three elements: (1) that she has a disability, (2) that she is a "qualified individual" for the employment in question, and (3) that the employer took some adverse employment action against her because of her alleged disability. *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373, 377 (4th Cir. 2000). If the employer can summon a legitimate, non-discriminatory reason for the adverse action, the burden then shifts back to the employee to establish "that an employer's asserted non-discriminatory reason for the challenged employment action is actually a pretext." *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

UPS has provided a legitimate explanation. The company maintains that it would not allow Young to work because she presented a doctor's note with a recommendation that she not lift more than 20 pounds. Because lifting was a central part of Young's job, the decisionmaker (*i.e.*, Carolyn Martin) determined that such a recommendation precluded Young from working at her regular job. "She then applied the standard policy applicable to off-duty injuries not otherwise dealt with in the [Collective Bargaining Agreement]." *Young*, 2011 WL 665321, at *14. UPS's explanation certainly amounts to a legitimate, non-discriminatory reason under the ADA. An employer is

entitled to rely on a medical recommendation in making employment decisions. As Young herself recognizes, "regarded as" liability was created to combat the myths and stereotypes attached to those with disabilities. "[I]f a restriction is based upon the recommendations of physicians, then it is not based upon myths or stereotypes about the disabled." *Kozisek v. Cnty. of Seward, Neb.*, 539 F.3d 930, 935 (8th Cir. 2008); *see also, e.g., Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 86 (1st Cir. 2008) ("[Plaintiff] may not rely exclusively on her employer's recognition or implementation of the restrictions imposed by her own physician to establish a regarded as claim."). Thus, because UPS has offered a legitimate, non-discriminatory reason for its refusal to allow Young to return to work, Young must establish pretext. In other words, Young must summon "sufficient evidence from which a jury could conclude that [UPS] did make its employment decision based on [Young]'s status as disabled despite [UPS]'s proffered explanation." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003).

Young argues that decision to send her home because of the lifting recommendation must have been discriminatory because "Ms. Young had *no* limitations and the medical provider imposed no restrictions."[6] (ECF No. 109, at 14 n.9). But Young

[6] Although Young argues that this is direct evidence, this argument is more appropriately considered a pretext argument

(Continued on following page)

never provided any medical evidence to UPS other than the initial note that included a lifting restriction. She did not obtain a second note from her midwife. She did not seek a medical opinion from any other medical provider that she was free to work. Instead, she attempted to put the onus on UPS to reach out to Young' medical provider, despite the rather clear language of the lifting restriction.[7] (ECF No. 109, at 18).

There is no case supporting the notion that an employer must question a medical provider's judgment and independently divine whether an employee is truly able to work. Nor was UPS required to let Young work merely because she insisted she was able to. *Cf. Alexander v. Northland Inn,* 321 F.3d 723, 727 (8th Cir. 2003) (stating, where an employee presents a doctor's recommendation restricting her from performing an essential function, that the employee's belief or opinion that she can do the function is simply irrelevant"); *Koshinkski v. Decatur Foundry, Inc.,* 177 F.3d 599, 602 (7th Cir. 1999) (finding employee did not state regarded as claim where doctors recommended that he not perform activities that were

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that goes to the alleged falsity of UPS's proffered non-discriminatory reasons.

[7] It seems legitimate for UPS to read the letter from Young's midwife as a "restriction," notwithstanding Young's hyper-semantic distinction between "recommendation" and "restriction."

essential aspects of his job, despite employee's wish to return to work).

In an additional attempt to establish pretext, Young points to employee "E441" as evidence that UPS did not have a consistent policy of strictly adhering to doctor's recommendations. In 2004, E441 apparently suffered an injury that forced her to miss work for medical reasons. When she returned, the record suggests that she returned to light duty. According to Young, E441 returned to work a few days later without a doctor's note clearing her for work. (ECF NO. 109, at 14).

Young is correct that "pretext is commonly demonstrated with other employees who were similarly situated to the plaintiff." *Middleton v. Frito-Lay, Inc.*, 68 F.Supp.2d 665, 670 (D.Md. 1999). But it would not appear that E441 is similarly situated. For one, there is no indication in the record that E441 returned to work after her medical absence with any restriction (or limiting recommendation) on her ability to work. Thus, E441 cannot serve as evidence that UPS will sometimes disregard a doctors' recommendation (ECF No. 109, at 16), as there were no relevant recommendations in that employee's case.[8] Moreover, Young has not established – or even alleged

[8] E441 presented a doctor's note stating she was unable to work from September 27, 2004 to October 4, 2004, but there is no indication – and Young does not argue – that UPS disregarded that note and allowed the employee to work during that period.

– that E441 was *not* a member of Young's protected class, *i.e.*, "disabled" or "regarded as disabled" individuals as defined in the ADA. The absence of any such evidence is fatal to any inference of pretext. If UPS regarded E441 as disabled and nevertheless treated her differently than Young, the difference in treatment would obviously *not* stem from a discriminatory animus towards the disabled. *See Myers v. Hose,* 50 F.3d 278, 284 (4th Cir. 1995) (finding the plaintiff's "similarly situated" argument "inapposite" because "all employees to whom [the plaintiff] compare[d] himself are also disabled").

Young cites several other pieces of "evidence" that do not require further discussion. It is enough to say that, at most, Young has "created only a weak issue of fact as to whether the employer's reason was untrue." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 148 (2000). In contrast, there is substantial evidence that UPS has a policy of not accommodating off-duty injuries and impairments, which the company applied in this case. Most importantly, the record is devoid of evidence that the decision to bar Young from working was motivated by an animus towards the disabled. "[T]he ADA was designed to assure that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps." *Halperin v. Abacus Tech. Corp.,* 128 F.3d 191, 200 (4th Cir. 1997), *overruled on other grounds by Baird v. Rose,* 192 F.3d

462 (4th Cir. 1999). There is nothing indicating that those interests are at play here.

Accordingly, just like her earlier arguments, Young's argument newest argument lacks merit. No reconsideration of the earlier decision is necessary.

III. Conclusion

For the foregoing reasons, Young's motion for reconsideration will be denied. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PEGGY YOUNG	:	
v.	:	Civil Action No.
UNITED PARCEL SERVICE, INC.	:	DKC 08-2586
	:	

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 9th day of August, 2011, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion for reconsideration (ECF No. 101) filed by Plaintiff Peggy Young BE, and the same hereby IS, DENIED;

2. The motion for leave to file a sur-reply to Defendant's bill of costs (ECF No. 111) filed by Plaintiff Peggy Young BE, and the same hereby IS, GRANTED;

3. The clerk is instructed to detach and file Exhibit 1 to ECF No. 111 as a surreply to Defendant's bill of costs; and

4. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties.

/s/
DEBORAH K. CHASANOW
United States District Judge

PETITIONER'S BRIEF

No. 12-1226

In The
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S BRIEF

SHARON FAST GUSTAFSON
ATTORNEY AT LAW, PLC
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sharon.fast.gustafson@gmail.com

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL LAW PROGRAM
625 S. State St.
Ann Arbor, MI 48109
(734) 647-7584
sambagen@umich.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Pregnancy Discrimination Act ("PDA") provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The question presented is:

Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

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BRIEF FOR THE PETITIONER

Petitioner Peggy Young respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 707 F.3d 437. The opinion of the district court granting summary judgment (Pet. App. 30a-83a) is reported at 2011 WL 665321.

JURISDICTION

The court of appeals entered judgment on January 9, 2013. Pet. App. 1a. The petition for a writ of *certiorari* was filed on April 8, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), is reprinted at Pet. App. 84a.

STATEMENT

United Parcel Service refused to permit Peggy Young to continue to work during her pregnancy after

her doctor and midwife recommended that she lift no more than 20 pounds. Pet. App. 5a-8a. UPS made this decision pursuant to a company policy that provides accommodated work to three sizeable classes of drivers: those who are injured on the job; those who have a disability as defined by the Americans with Disabilities Act, 42 U.S.C. § 12102; and those who, for medical reasons, do not meet Department of Transportation standards to drive a commercial motor vehicle. Pet. App. 3a-4a. But the company does not provide accommodated work to drivers whose limitations result from pregnancy alone. Pet. App. 4a. Because the court of appeals affirmed the district court's grant of summary judgment to UPS, all facts in the record must be viewed – and all reasonable inferences must be drawn – in favor of Young, the nonmoving party. See *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (*per curiam*).

A. The Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits employers from discriminating on the basis of sex in the terms and conditions of employment. See 42 U.S.C. § 2000e-2(a)(1). Because of the close relationship between pregnancy and sex, in 1972 the Equal Employment Opportunity Commission interpreted Title VII's prohibition of sex discrimination to bar discrimination based on pregnancy. See 29 C.F.R. § 1604.10(a) (1973). Based on that interpretation, the EEOC concluded that the statute required employment benefits to "be applied to disability due

to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. § 1604.10(b) (1973).

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), however, this Court rejected the EEOC's interpretation. *Gilbert* involved a Title VII challenge to an employer's disability insurance plan. See *id.* at 127-128. That plan provided benefits to employees unable to work because of a nonoccupational sickness or accident, but not to those unable to work because of pregnancy. See *id.* at 128-129. Rejecting the plaintiff's challenge, the Court held that the insurance plan was "facially nondiscriminatory" despite its failure to cover pregnancy-based disability. *Id.* at 138. The Court concluded that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.* at 139. Relying on its decision interpreting the Fourteenth Amendment in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court reasoned that discrimination on the basis of pregnancy is not sex discrimination, because the class of "'nonpregnant persons'" includes "'members of both sexes.'" *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496-497 n.20).

Congress adopted the Pregnancy Discrimination Act of 1978 with the acknowledged intent to overturn "both the holding and the reasoning of the Court in the *Gilbert* decision." *Newport News Shipbuilding &*

Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 678 (1983). The PDA added a new subsection to Title VII, Section 701(k), 42 U.S.C. § 2000e(k). That subsection's first clause provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). That clause "reflects Congress' disapproval of the reasoning in *Gilbert*." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284-285 (1987) ("*CalFed*"). The PDA's second clause directs that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That clause "was intended to overrule the holding in *Gilbert*." *CalFed*, 479 U.S. at 285.[1]

B. UPS's Accommodated Work Policies

As a matter of policy, UPS makes accommodations for three classes of drivers with illnesses or injuries that temporarily prevent them from performing their

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[1] The PDA also included a proviso to make clear that the language quoted in text does "not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k).

full job duties. Pet. App. 3a-4a. *First*, UPS provides what it calls "temporary alternate work" to "those employees who are unable to perform their normal work assignments due to an on-the-job injury." J.A. 584 (collective bargaining agreement). UPS employees and managers often refer interchangeably to "alternate work" and "light duty." J.A. 630, 653.

The record contains numerous examples of drivers whom UPS accommodated after they experienced workplace injuries that limited their ability to lift. See J.A. 640 (workers with lifting restrictions assigned to sort small packages, do clerical work, and handle paperwork and phones); C.A.J.A. 1528-1535 (filed under seal) (UPS's restricted work register, listing over 20 instances in which employees with lifting restrictions received accommodated work in Young's district). For example, one driver, who held the same "air driver" job as petitioner Young, was temporarily unable to lift packages above approximately 10 pounds after she injured her arm on the job. J.A. 399-402. UPS reassigned her to an inside position in which she "helped gather packages to be readdressed or redirected to a different address." *Id.* at 400. If a package was too heavy for her to lift, she "let someone else know and they came and got the packages off the truck." *Id.* at 401. Another air driver injured her foot on the job; UPS assigned her to a light duty office job, in which she "typed forms and answered the phone and made copies," and "did not lift anything near 20 pounds," until she recovered. *Id.* at 635. And UPS put still another driver, who sprained his ankle on the job, in a light duty position

"where all [he] had to do was answer phones." *Id.* at 655.

Second, UPS offers "light duty work" as a reasonable accommodation to drivers with ADA-qualifying disabilities, whether those individuals acquired their impairments on or off the job. Pet. App. 4a. See J.A. 585.

Third, UPS will temporarily provide an "inside job[ ]" to a driver who "is judged medically unqualified to drive." J.A. 596. The collective bargaining agreement specifically provides for "alternate" or "alternative" work for drivers who are "unable to successfully pass the DOT commercial drivers license (CDL) examination." *Id.* at 590-591. See 49 C.F.R. § 391.45 (DOT requirement of medical examination and certification that a driver is qualified to drive a commercial motor vehicle). The Department of Transportation regulations setting forth the physical qualifications for drivers, 49 C.F.R. § 391.41, list numerous disqualifying conditions that may be acquired outside of the workplace. These include:

- "loss of a foot, a leg, a hand, or an arm," § 391.41(b)(1);
- impairment of a "hand or finger which interferes with prehension or power grasping," § 391.41(b)(2)(i);
- impairment of an "arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle," § 391.41(b)(2)(ii);

- "any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle," *id.*;
- diabetes, § 391.41(b)(3);
- cardiovascular disease, § 391.41(b)(4);
- respiratory dysfunction, § 391.41(b)(5);
- high blood pressure, § 391.41(b)(6);
- "rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease," § 391.41(b)(7);
- epilepsy, § 391.41(b)(8); and
- vision and hearing impairments, § 391.41(b)(10), (11).

Many of these conditions (notably limb impairments, cardiovascular disease, hypertension, and neuromuscular disease) may limit an individual's ability to lift heavy loads.[2] Indeed, a lifting restriction

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[2] See, *e.g.*, American Heart Ass'n, Pulmonary Hypertension, http://goo.gl/W8nvXj (because "[s]trenuous physical activity * * * is associated with serious increases in pulmonary artery pressure," recommending that individuals with hypertension "avoid isometric exercises and activities like heavy lifting"); Cleveland Clinic, Living with Pulmonary Hypertension: Dietary and Lifestyle Changes, http://goo.gl/LGSijp (recommending "[r]estrict[ing] lifting, pushing, or shoving to less than 20 pounds, since these activities increase the pressure in your arteries and lungs").

deriving from one of these conditions (even from, as a UPS manager testified, a "sports injury," see J.A. 80-81) may itself be the reason why a driver becomes ineligible for DOT certification. See 49 C.F.R. § 391.43 Att. (certificate of medical examination form, including lifting among the tasks for which drivers of commercial motor vehicles must be fit). The rules governing medical certification require a medical examiner, before issuing a certificate, to "determine that a driver is medically fit to drive and also able to perform non-driving responsibilities." Fed. Motor Carrier Safety Admin., Medical Examiner Handbook 43. DOT's handbook for medical examiners states flatly that *"[t]here are no work restrictions permitted. The commercial driver must be able to perform all job-related tasks, including lifting, to be certified."* *Id.* at 41 (emphasis in original).

A shop steward in Young's workplace testified that "[w]hen the UPS drivers cannot pass the D.O.T. test, they work light duty in the building." J.A. 636. Although the court of appeals said that "an inside job often involves heavy lifting," Pet. App. 4a, the record contains a number of examples of UPS drivers who were ineligible for DOT certification and received light-duty assignments. One driver, who "lost [her] DOT card due to high blood pressure," was reassigned to a job that involved "scan[ning] packages and ma[king] address corrections, and put[ting] on address labels." J.A. 647. She "did not have to lift the packages, but [she] did have to flip them on the belt." *Id.* Another driver, who injured her ankle during

military service, was (after being unable to continue to perform the standard duties of her driving job) eventually temporarily accommodated by being permitted to scan, but not lift, packages. *Id.* at 446-452. And still another driver, who had a stroke, was reassigned to a clerk's position making phone calls. *Id.* at 397-398. A UPS manager, speaking for the company pursuant to Fed. R. Civ. P. 30(b)(6), testified that DOT-ineligible drivers who receive reassignments typically do not displace any incumbent employees, because "[u]sually there will be positions available that they can just slide into." *Id.* at 261.

The same manager explained why the company provides temporary reassignments to DOT-ineligible drivers. See J.A. 281-282. He noted that "it's very expensive to hire new employees," that there is a "lot of training time involved," and that retaining someone who is temporarily unable to drive provides a "benefit to the company" by "keep[ing] the employee that has a lot of knowledge of the area or route that they normally would deliver." *Id.*

Although UPS provides temporary accommodated work to drivers with on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions, it does not do the same thing for drivers who need workplace accommodations due to pregnancy. See Pet. App. 35a. A shop steward testified that "[t]o the best of [her] knowledge, the *only* light duty requested restrictions that became an issue" in her workplace "were with women who were pregnant." J.A. 504 (emphasis added). Indeed, during negotiations over the collective

bargaining agreement that governs its drivers, UPS *rejected* language, proposed by the Teamsters Union, "that would have provided light duty to all employees who requested light duty as a result of a pregnancy-related condition." J.A. 651. UPS also "rejected other proposals that clearly would have provided alternate work for all UPS employees who temporarily could not perform their regular jobs due to pregnancy-related conditions." *Id.* See also J.A. 358-360.

In the end, UPS would agree to only the following CBA language: "A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. As indicated by its position in this case, UPS does not regard the federal Pregnancy Discrimination Act as requiring it to provide light duty to pregnant drivers, even though the company provides light duty to drivers with similar work limitations. UPS thus interprets the CBA as requiring it to accommodate pregnant drivers only in those states, like California, that have passed separate laws mandating such accommodation. J.A. 360-361, 651-652.

C. Peggy Young's Pregnancy

UPS hired Young in 1999; in January 2002, she began working as a part-time early-morning "air driver." J.A. 658-659. In that job, Young was responsible for "meet[ing] a shuttle from the airport bearing letters and packages for immediate delivery" and delivering them by 8:30 that morning. Pet. App. 4a-5a,

33a. "Young typically finished her work responsibilities by 9:45 or 10 in the morning, and then proceeded to her second job at a flower delivery company." Pet. App. 5a, 33a.

UPS's list of essential job functions purports to require air drivers to be able to "[l]ift, lower, push, pull, leverage and manipulate" packages "weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." J.A. 578. But these lifting requirements were not a meaningful part of Young's day-to-day job. Cf. *Garcetti v. Ceballos*, 547 U.S. 410, 424-425 (2006) (noting that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform"). Because "[a]ir delivery is more expensive by weight than ground delivery," air drivers "often carr[y] lighter letters and packs, as opposed to heavier packages." Pet. App. 31a. Young testified that "[a]lmost all" of the deliveries on her route (the "Annapolis route"), were "of envelopes – such as letters and paychecks – weighing much less than 20 pounds." J.A. 659. Analysis of an eight-month sample of Young's delivery records confirmed that testimony: out of an average of 78 deliveries Young made each week, only 2 involved packages weighing more than 20 pounds, and less than 1 involved a package weighing more than 30 pounds. J.A. 642-645. And Young testified that she shared her route with a more senior driver, who divided up the packages and was willing to deliver the heavy ones herself. J.A. 658-659. See also DCt. Dkt. 76-15 ¶ 5 (another air driver testified that, when

she was pregnant, coworkers were willing to deliver her heavier packages if she was willing to take on some of their deliveries of lighter packages).

In July 2006, Young sought, and UPS granted, an unpaid leave of absence so she could undergo a round of *in vitro* fertilization. Pet. App. 5a. The round was successful, and Young became pregnant. Pet. App. 5a, 39a. In September 2006, Young, who was still on leave, delivered to UPS a note from her OB/GYN, which included the doctor's "recommendation that she not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." J.A. 580. The next month, she gave her supervisor and UPS's occupational health manager a note from her midwife; that note stated that "[d]ue to her pregnancy it is recommended that she not lift more than 20 pounds." J.A. 682. Young informed her supervisor that she wished to return to work. J.A. 663.

In late October, Young spoke with UPS's occupational health manager. Pet. App. 41a-42a. The manager told Young that "[b]ased on company policy," Young could not continue working in her air driver position "with her 20-pound lifting restriction." Pet. App. 42a. And the manager told Young that UPS would not temporarily reassign her to another position, "because UPS did not give light duty for pregnancy but only for workplace injuries." J.A. 663. Young responded that she could continue to perform her air driver job, because that job, in fact, did not require her to carry heavy packages, and because her

coworkers would help her with any heavy packages that did come along. J.A. 663-664. Young explained "that she was willing to do either light duty or her regular job." Pet. App. 5a. But the occupational health manager refused to allow Young to return to work. Pet. App. 42a. In November, Young spoke to UPS's division manager, who "told her she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" Pet. App. 8a.

As a result, Young was required to go on an extended, unpaid leave of absence, during which she lost her medical coverage. *Id.* at 8a. She did not return to work until June 2006, just short of two months after she gave birth. *Id.* at 43a-44a.

D. Proceedings Below

After exhausting her remedies with the Equal Employment Opportunity Commission (EEOC), Young filed this lawsuit in October 2008 in the United States District Court for the District of Maryland. Pet. App. 8a, 44a. The complaint alleged, *inter alia*, that UPS violated the PDA by failing to provide Young the same accommodations it provided to non-pregnant employees who were similar in their ability to work. J.A. 53.

In February 2011, the district court granted summary judgment to UPS. Pet. App. 30a-83a. The court concluded that UPS's determination not to accommodate Young's lifting restriction turned on

"gender-neutral criteria," because UPS accommodates "only drivers (1) who suffered on-the-job injuries; (2) who were disabled under the Americans with Disabilities Act; or (3) [who] lost their DOT certification to drive." *Id.* at 56a-57a. Because this policy was "gender-neutral," the district court concluded that it did not constitute direct evidence of discrimination. *Id.* Nor could it support an inference "that the employer has animus directed *specifically* at pregnant women," which the court thought necessary to support a *prima facie* case under the analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See Pet. App. 61a.

The Fourth Circuit affirmed. Pet. App. 3a. The court concluded that "UPS ha[d] crafted a pregnancy-blind policy" by "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification." Pet. App. 18a. Although Young had argued that UPS's limitation of accommodations to individuals in those three categories violated the PDA's requirement that pregnant women "shall be treated the same" as nonpregnant employees "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the Fourth Circuit held that the statute's "shall be treated the same" language "does not create a distinct and independent cause of action." Pet. App. 20a-21a.

The court went on to conclude that "a pregnant worker subject to a temporary lifting restriction is not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or

an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. Unlike an individual with an ADA-qualifying disability, Young's limitation "was temporary and not a significant restriction on her ability to perform major life activities." *Id.* Unlike "employees guaranteed an inside job or light duty under the CBA provision for drivers who have lost DOT certification," there was "no legal obstacle" preventing Young from working – and unlike at least some of those drivers, who "maintained the ability to perform any number of demanding physical tasks," Young "labored under an apparent inability to perform tasks involving lifting." *Id.* at 27a-28a (footnote and internal quotation marks omitted). Finally, the court stated that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a.

SUMMARY OF ARGUMENT

UPS provides temporary accommodated work to three sizeable classes of drivers with work restrictions: those with on-the-job injuries, those with ADA disabilities, and those with conditions that render them ineligible for DOT certification. But it does not provide accommodated work to drivers who experience similar work restrictions due to pregnancy. That disparity violates the PDA's requirement that "women affected by pregnancy, childbirth, or related

medical conditions shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

The PDA's import is plain: When two sets of employees experience similar restrictions on their ability to work – one because of pregnancy and the other because of some other condition – the employer must not give any lesser accommodation to the pregnant workers than it gives to the nonpregnant workers. Legislative history and administrative construction further bolster what the statutory text makes clear. The court of appeals, however, strayed from that plain text. That court ruled that an employer is free to deny pregnant workers the accommodations it provides other employees with similar work limitations, so long as the employer does so pursuant to a "pregnancy-blind policy." Under the court of appeals' interpretation, the PDA's second clause (with the "shall be treated the same" language) adds nothing to the statute's first clause (which defines sex discrimination to include pregnancy discrimination). If the court of appeals' "pregnancy-blind" rule were to prevail, the PDA's second clause would not serve its acknowledged function of overturning the holding in *General Electric v. Gilbert*, *supra*.

If Peggy Young's lifting restriction had resulted from an on-the-job injury, an ADA disability, or a condition that rendered her ineligible for DOT certification, the summary judgment record indicates that UPS would have accommodated it. But because her restriction resulted from pregnancy, UPS refused to

do so. UPS accordingly violated the PDA. The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation, and it does not ask *why* the employer has accommodated some workers rather than others. Instead, the statute demands a single, simple basis of comparison – similarity in the ability or inability to work. By refusing to give Young the same accommodations it gave to other drivers with work limitations, UPS failed to treat her the same as others similar in the ability to work. Indeed, given the very large classes of drivers whom UPS accommodates, and the testimony at summary judgment indicating that pregnancy is the *only* condition for which light-duty accommodations became an issue, the violation of the PDA here is especially apparent.

The violation of the PDA is apparent without any inquiry into subjective intent. Indeed, it appears on the face of UPS's acknowledged policies. Accordingly, it is unnecessary to engage in the judicially-crafted burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, *supra*, to decide this case. If the Court does apply *McDonnell Douglas*, however, it should still reverse.

Any argument that Young's claim would impermissibly override UPS's collectively-bargained seniority system is not properly before the Court. In any event, it lacks merit. Providing accommodated work to Young pursuant to the PDA would be consistent with the terms of UPS's collective bargaining agreement. The summary judgment record also indicates

that an accommodation would not have displaced a more senior worker. And if the seniority system were to stand in the way of providing the same treatment the PDA requires, it would not be a bona fide system under this Court's precedents.

ARGUMENT

Because her doctor had advised her against lifting heavy packages, UPS required Peggy Young to take unpaid leave during her pregnancy. But the company would have accommodated a driver with the same lifting restriction if the restriction had resulted from a workplace injury, an ADA-qualifying disability, or a condition that made the driver ineligible for DOT certification. By denying Young the same treatment, simply because her restriction resulted from pregnancy and not one of these conditions, UPS violated the PDA's plain requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

This statutory language was crafted to "prevent employers from treating pregnancy and childbirth differently from other causes of disability." S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977). The PDA's sponsors explained that employers often viewed women – and pregnant women in particular – as

"marginal workers" who were unlikely to remain in the workforce, and that this perception lay "at the root of the discriminatory practices" that limited employment opportunities. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 3 (1978). See also 123 Cong. Rec. 10,582 (1977) (Rep. Hawkins) ("[D]iscrimination against pregnant women is one of the chief ways in which women's careers have been impeded and women employees treated like second-class employees."). They responded to evidence that employers often forced pregnant women out of the workplace – that "'many women become labor-force outcasts upon pregnancy, not by choice, but because of their employers' preconceptions or prejudices.'" *Id.* at 7,541 (Sen. Williams) (quoting Ruth Bader Ginsburg & Susan Deller Ross, *Pregnancy and Discrimination*, N.Y. Times, Jan. 25, 1977). The sponsors expressed particular concern that "[m]any women temporarily disabled by pregnancy ha[d] been forced to take leave without pay." *Id.* at 29,387 (Sen. Javits). For many low-income women, the sponsors believed the result of such practices would be to deny "their children adequate nutrition and health care," force them to rely on public assistance, and perhaps lead them "to feel that their only alternative is an abortion." *Id.* at 7,541 (Sen. Brooke).

The PDA thus seeks to ensure that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991). By treating

Young's pregnancy differently from other causes of disability and requiring her to take unpaid leave, UPS did exactly what the PDA forbids.

A. The PDA Required UPS to Afford Pregnant Workers the Same Accommodations It Afforded Other Employees with Disabling Conditions Who Were Similar in Their Ability to Work

As this Court has explained, "'[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees "shall be treated the same for all employment-related purposes" as nonpregnant employees similarly situated with respect to their ability or inability to work.'" *Johnson Controls*, 499 U.S. 187, 204-05 (quoting *CalFed*, 479 U.S. at 297 (White, J., dissenting)). The import of that clause is plain: When two sets of employees experience similar restrictions on their ability to work – one because of pregnancy and the other because of some other condition – the employer must not give any lesser accommodation to the pregnant workers than it gives to the nonpregnant workers. See *Newport News Shipbuilding*, 462 U.S. at 684 (PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions"). Rather, the two employees "shall be treated the same." 42 U.S.C. § 2000e(k).

Thus, when an employer provides light-duty work to a class of workers who are temporarily unable

to perform their usual job duties due to injury or illness, the plain statutory text requires it to provide the same light-duty work to pregnant workers who are similarly unable to perform those duties. The PDA's legislative history specifically contemplates this application of the statute. The House Report explained that "[t]he 'same treatment'" required by the statute "may include employer practices of transferring workers to lighter assignments," but that any such practice must be "administered equally for all workers in terms of their actual ability to perform work." H.R. Rep. No. 95-948, *supra*, at 5.

The EEOC, which administers and enforces the PDA, has long endorsed this plain-language reading as well. In an appendix to its regulations issued in 1979, just a year after Congress adopted the statute, the Commission stated that "[a]n employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc." 29 C.F.R. Pt. 1604 App. ¶ 5. The appendix specifically addressed the example of accommodation for a pregnant worker's lifting restriction: "If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Id.* And the EEOC's recent enforcement guidance on pregnancy discrimination reaffirms that "[a]n employer may not refuse

to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations." EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues § I.A.5. (July 14, 2014) (hereinafter "EEOC Enforcement Guidance"). By setting forth the view of the administering and enforcing agency, these pronouncements are "entitled to a measure of respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008). In any event, they merely confirm what is evident from the plain statutory text.

The court of appeals strayed from that plain text. It ruled that, even if an employer does not accommodate pregnancy to the same extent that it accommodates other conditions with a similar effect on the ability to work, the employer cannot be liable if the denial of accommodation stems from "a neutral, pregnancy-blind policy." Pet. App. 27a. See also Pet. App. 18a-24a. In the court of appeals' view, an employer can refuse to provide the same accommodations for pregnancy that it provides for, say, on-the-job injuries, so long as it does not exclude pregnant workers *who also have on-the-job injuries* from receiving accommodations. That position reflects a fundamental misreading of the statute.

The position of the court of appeals would render the PDA's second clause entirely superfluous. After all, the PDA's first clause *itself* prohibits employers from refusing to provide pregnant workers with

on-the-job injuries the same accommodations that it provides nonpregnant workers with those injuries. The first clause defines the term "because of sex" in Title VII to include "because of or on the basis of pregnancy." 42 U.S.C. § 2000e(k). Denying pregnant workers with on-the-job injuries the same accommodations that an employer provides to nonpregnant workers with on-the-job injuries is a clear case of discrimination "because of * * * pregnancy."

The second clause must mean something more. See *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468-69 (2014) (interpreting statute to avoid surplusage); *Clark v. Rameker*, 134 S. Ct. 2242, 2248-2249 (2014) (same). By providing that pregnant workers "shall be treated the same" as "other persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the PDA's second clause requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.[3]

This Court has said that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 133 S. Ct.

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[3] See also EEOC Enforcement Guidance, *supra*, § I.C.1.b. ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation.").

1166, 1178 (2013). See also *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330 (2011) ("[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (internal quotation marks omitted). That principle is particularly apt here. As this Court has noted, the PDA's two clauses serve distinct functions. The first clause "reflects Congress' disapproval of the *reasoning* in *Gilbert*" – *viz.*, that pregnancy discrimination is not sex discrimination. *CalFed*, 479 U.S. at 284-85 (emphasis added). But the second clause serves a different function: "to overrule the *holding* in *Gilbert*" that a disability insurance program that did not insure against pregnancy complied with Title VII. *CalFed*, 479 U.S. at 285 (emphasis added).

If the court of appeals' "pregnancy-blind" rule were to prevail, the PDA's second clause would not serve its acknowledged function of overruling *Gilbert*'s holding. *Gilbert* held that an employer's failure to cover pregnancy in its disability insurance plan was "facially nondiscriminatory in the sense that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.'" *Gilbert*, 429 U.S. at 138 (quoting *Geduldig*, 417 U.S. at 496-497). That, of course, is exactly the same sense in which UPS's accommodated-work policy was "neutral" and "pregnancy-blind" – there was no injury or condition for which nonpregnant workers were accommodated and pregnant workers were not. Conversely, the

disability insurance plan at issue in *Gilbert* plainly would have counted as "pregnancy-blind" under the court of appeals' analysis. That plan provided both pregnant and nonpregnant workers coverage for "nonoccupational sickness or accident." *Gilbert*, 429 U.S. at 128. It simply failed to provide coverage for what the Court called the "*additional* risk" of pregnancy itself. *Id.* at 139. The Court concluded that "the failure to compensate [women] for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks." *Id.* The "pregnancy-blind" rule of the court of appeals essentially revives *Gilbert*'s "facially evenhanded" analysis. It thus utterly subverts both the statutory text and expressed congressional intent.[4]

The court of appeals expressly refused to give separate effect to the PDA's second clause. Pet. App. 20a-21a. The court gave two reasons for that refusal: first, that the clause's "placement in the definitional section of Title VII, and grounding within the confines

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[4] The "pregnancy-blind" rule would also render lawful other practices that the PDA's sponsors understood as clear violations of the statute, such as the then-common refusal to permit "women to use their sick days when unable to work due to pregnancy or childbirth." 123 Cong. Rec. 10,582 (Rep. Hawkins). Accord *id.* at 29,385 (Sen. Williams). Under the court of appeals' rule, an employer could, in fact, forbid women to use sick days when unable to work due to pregnancy – so long as the employer did not forbid pregnant women who had some *unrelated* illness or injury from using sick days.

of sex discrimination under § 703, make clear that it does not create a distinct and independent cause of action"; and, second, that according the clause its plain meaning would lead pregnancy to be "treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII." *Id.* Neither argument supports the lower court's holding.

First, the PDA's plain text does more than simply provide a definition. To be sure, the first clause simply defines "sex" as including "pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). But the second clause by its terms sets forth a substantive rule governing the conduct of employers – pregnant workers "shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." *Id.* In *Johnson Controls*, 499 U.S. at 205, this Court refused "to read the second clause out of the Act." To the contrary, the Court explained that the PDA's second clause imposes a substantive obligation on employers. See *id.* That conclusion applies equally here.[5]

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[5] Similarly, this Court has held that the religion provision of Title VII, which appears in the statute's definitional section in a subsection immediately adjacent to the PDA, 42 U.S.C. § 2000e(j), imposes on an employer a substantive obligation "to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

Second, it is true that the "similar in their ability or inability to work" language does not apply to any other basis covered by Title VII. But that is neither novel nor suspicious. For example, the subsection that immediately precedes the PDA, 42 U.S.C. § 2000e(j), requires reasonable accommodation of religion – a requirement that does not apply to any other basis covered by Title VII. Just as the reasonable accommodation provision responds to unique dynamics of religious discrimination, the PDA's second clause responds to unique dynamics of pregnancy discrimination. In particular, the PDA addresses a context in which a temporary work disability is often transformed into a life-long denial of employment opportunities because of the failure to provide pregnant workers the same consideration as other, more valued employees who are no more able to do the job. This dynamic, which does not apply to the other bases covered by Title VII, was a central focus of congressional discussion. See pp. 18-19, *supra*.[6] Congress addressed the problem by requiring that

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[6] See also *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003) (describing the "faultline between work and family" as "precisely where sex-based overgeneralization has been and remains strongest"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 96 Geo. L.J. 567, 577 (2010) (compiling evidence of "the persistence of stereotyped perceptions and decisionmaking with respect to pregnant workers"); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 Hastings L.J. 1359, 1369-1372 (2008) (compiling experimental evidence that pregnant workers are viewed more negatively than other female workers).

pregnant women be treated the same as other employees who were similar, not in their diagnosis, the cause of their limitation, or their compatibility with a supposedly pregnancy-blind employer policy, but "in their ability or inability to work," 42 U.S.C. § 2000e(k).

Nor would giving separate effect to the PDA's second clause afford "preferential treatment" to pregnant workers. Cf. Pet. App. 23a. To the contrary, it would merely guarantee the equal treatment the statute demands. It would simply require an employer that accommodates nonpregnant employees' work limitations to do the same for pregnant workers who are just as able to do the job. That is what the PDA's plain text dictates, and it accords with the statute's purpose to ensure that pregnant women are treated as "valued, career employees," 123 Cong. Rec. 10,582 (1977) (Rep. Hawkins), rather than as "marginal workers," H.R. Rep. No. 95-948, *supra*, at 3. A contrary rule would authorize employers to treat pregnant workers *worse* than they treat other workers who are no more capable of doing the job. But that is precisely what the PDA's text forbids.

To be sure, when an employer accommodates only a subset of workers with disabling conditions (such as those who experienced on-the-job injuries), the PDA's plain text requires that pregnant workers who are similar in the ability to work receive the same treatment even if still other nonpregnant workers do not receive accommodations. Cf. Pet. App. 22a. But that is the result of the employer's decision to accommodate

only a subset of workers in the first place.[7] So far as the PDA is concerned, an employer is free to accommodate *none* of its workers. If the employer follows that course, pregnant workers are entitled to no better treatment. By contrast, when an employer provides light-duty work to a group of workers who are "similar in their ability or inability to work," pregnant workers must "be treated the same." 42 U.S.C. § 2000e(k).

The court of appeals suggested that the PDA does not entitle pregnant workers to accommodation unless accommodation is available to the entire "universe – male and female – of nonpregnant employees" with similar work limitations. Pet. App. 19a. But that is not a fair reading of the PDA's second clause.[8] The second clause requires that pregnant workers receive the same accommodations "as other persons

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[7] It is hardly novel to regard as discriminatory an employer's decision to treat a group of workers worse than a second, more favored group of workers, even if still a third group of workers is also denied more favorable treatment. Cf. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365-367 (3d Cir. 1999) (Alito, J.) (police department that provided medical exemptions to its general no-beard policy unconstitutionally disfavored officers with religious reasons for having beards).

[8] Even if the court of appeals' suggestion correctly stated the law, this Court should still reverse. As the next section makes clear, the evidence at summary judgment was sufficient to support the conclusion that virtually any nonpregnant driver with a lifting restriction would receive an accommodation from UPS.

not so affected but similar in their ability or inability to work." *Id.* The statute's unqualified, generic phrasing – the same "as other persons," not "as all other persons" or "only to the extent that all other persons get the same treatment" – makes clear that when an employer accommodates a group of workers, it must give pregnant workers with similar limitations the same treatment. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 9 (2012) (general words are to be given their general meaning).

An employer may accommodate a group of workers for business reasons, such as to retain valued employees or boost workplace morale, or it may do so because independent legal obligations set a baseline of fair treatment. As the next section shows, UPS's accommodation policies stemmed from a mixture of these motives. Either way, the failure to extend the same accommodations to pregnant women who are similar in their ability to work treats pregnant workers like second-class or marginal workers. The PDA's second clause, by its terms, forbids that result.

B. UPS Treated Young Differently From Three Classes of Drivers with Disabling Conditions Who Were Similar in Their Ability to Work

It is undisputed that UPS provides accommodated work to three sizeable classes of drivers with work limitations: those who experienced injuries on the job;

those whose conditions qualify as disabilities under the ADA; and those whose conditions render them ineligible for DOT certification. A driver in one of these three classes with a lifting restriction, the summary judgment record indicates, would have received a workplace accommodation. And, indeed, the record shows that UPS did accommodate numerous drivers with 10- or 20-pound lifting restrictions. Peggy Young had precisely the same lifting restriction. Yet because that restriction was the result of her pregnancy, UPS refused to accommodate it – either by allowing her to continue driving but trade heavy packages to another driver, or by temporarily reassigning her to a nondriving position that did not require heavy lifting. UPS thus violated the PDA's mandate that pregnant workers "shall be treated the same * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

If UPS had provided accommodated work to drivers in only *one* of these three classes, its actions would have violated the PDA. The company would, after all, have been treating pregnant drivers differently in the terms and conditions of employment than it treated "other persons * * * similar in their ability or inability to work." But UPS did more than that. The three classes of drivers to whom the company provides accommodated work encompass an extremely large fraction of those drivers who need workplace accommodations – with the notable exception of those who need accommodations due to pregnancy. Indeed, a shop steward testified that "[t]o the best of [her]

knowledge, the only light duty requested restrictions that became an issue were with women who were pregnant." J.A. 504. By accommodating drivers in *all three* of those classes, but not pregnant drivers, UPS plainly violated the PDA.

1. On-the-Job Injuries

UPS policy gives light-duty work to those drivers who require accommodation due to on-the-job injuries. See pp. 4-6, *supra*. Had her lifting restriction resulted from an on-the-job injury rather than pregnancy, there is no question that Peggy Young would have received an accommodation that allowed her to continue working. The record contains numerous examples of drivers who received accommodation for lifting restrictions that were virtually identical to Young's but resulted from on-the-job injuries. See pp. 5-6, *supra*. By denying Young the same accommodation, even though she was "similar in the[ ] ability or inability to work," 42 U.S.C. § 2000e(k), UPS violated the PDA.

The court of appeals concluded that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury." Pet. App. 28a. That tautological reasoning entirely misses the point. The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation. The statute gives a different basis for comparison. It asks whether a pregnant worker has been treated the

same as other employees who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Along that dimension – the only dimension the statute makes relevant – Peggy Young was plainly similar to the many UPS employees with on-the-job injuries who received light duty for their lifting restrictions.[9]

To be sure, UPS may have a good reason for its policy of providing light-duty work to those with on-the-job injuries. Such a policy may keep valued workers on the job, save the company the cost of training new employees, limit workers' compensation

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[9] The EEOC's position is in accord. See EEOC Enforcement Guidance § I.C.1.b. ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation. Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work."). In its filings at the petition stage, UPS suggested that the Commission's position does not, in fact, accord with our argument. See Br. in Opp. 26 n.2; UPS Supp. Br. 8. UPS cited an EEOC press release that stated that "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." EEOC, Press Release: EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute, available at http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (Sept. 4, 1996). But that press release did not purport to address the PDA's requirements. Rather, as its title indicates, it addressed the application of the ADA only. See *id.* The ADA does not contain the PDA's "shall be treated the same" language.

liability, and satisfy the demands of collective-bargaining representatives.[10] Many of these reasons, of course, would also apply to pregnant workers. In any event, as this Court explained in an earlier PDA case, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Johnson Controls*, 499 U.S. at 199.

UPS's terms and conditions of employment do not treat pregnant drivers the same as they treat non-pregnant drivers who are similar in the ability to work. When a driver experiences an on-the-job injury, the company gives the driver an opportunity to remain at work, in a temporary light-duty job, while he or she recovers. But when a driver experiences similar work limitations because of pregnancy, the company does not give her the same accommodation. That disparity, whatever its motivation, treats pregnant drivers as marginal rather than valued workers. It is a violation of the plain terms of the PDA.

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[10] See Leslie M. Batterson *et al.*, *Return-to-Work Programs*, RM/INSIGHT, Vol. 9, No. 1 at 9 (2009) (temporary accommodated work can help "maintain an experienced workforce"; "maintain production, workflow and quality standards"; "stabilize wage and production expenses"; "improve compliance with state and federal employment regulations"; "improve morale and self-esteem"; and "accelerate/improve recovery").

In its filings at the petition stage, UPS argued that the PDA's "legislative history is rife with examples specifically allowing employers to treat pregnant employees the same as employees injured off the job," even if they accommodate workers injured on the job. Br. in Opp. 14. UPS pointed to snippets of three floor statements – snippets that described the PDA as requiring that "disability due to pregnancy must be treated the same as any other non-work-related disability." 123 Cong. Rec. 29,660 (1977) (Sen. Biden). See also *id.* at 29,663 (Sen. Culver) (similar); 124 Cong. Rec. 21,436 (1978) (Rep. Sarasin) (similar). Even if UPS's interpretation of these snippets were correct, the legislative history could not trump the text. And the plain statutory text does not draw any distinction between on-the-job and off-the-job injuries.

In any event, UPS misreads these snippets of the legislative debates. The floor statements of Senators Biden and Culver and Representative Sarasin did not purport to draw or endorse any on-the-job/off-the-job distinction. Rather, they simply stated that an employer that provides no medical or disability benefits to nonpregnant workers has no obligation to provide those benefits to pregnant workers.[11] The statement

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[11] See 123 Cong. Rec. 29,660 (Sen. Biden) ("First, the bill does not require employers to provide medical insurance or benefits for its employees. It simply requires that if coverage or benefits are given that disability due to pregnancy must be treated the same as any other non-work-related disability."); *id.* at 29,663 (Sen. Culver) ("The legislation before us today does not mandate compulsory disability coverage. Rather, it requires

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that "disability due to pregnancy must be treated the same as any other non-work-related disability" did not purport to offer a comprehensive summary of the statute's requirements. Rather, it was an evident reference to the facts of *Gilbert*, in which the employer's plan treated pregnancy differently from other "nonoccupational sickness or accident." *Gilbert*, 429 U.S. at 128. Neither Senators Biden and Culver nor Representative Sarasin endorsed the position that UPS takes here – that an employer that provides light duty for workers injured on the job need not provide light duty for pregnant workers who are similar in the ability to work. Such a position would contradict the House Report's clear statement that the statute requires workplace practices, including "employer practices of transferring workers to lighter assignments," to be "administered equally for all workers in terms of their *actual ability to perform work*." H.R. Rep. No. 95-948, *supra*, at 5 (emphasis added).[12]

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those employers who do provide disability coverage to treat pregnancy-related disabilities the same as any other nonwork related disability with regard to benefits and leave policies."); 124 Cong. Rec. 21,436 (Rep. Sarasin) ("[The PDA] would not require any coverage at all where no temporary disability, or sick leave, or health insurance plan is provided. It would not require extending coverage beyond job-related disability if that is all the existing coverage provides.").

[12] For other similar statements in the legislative history, see S. Rep. No. 95-331, *supra*, at 4 ("treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work"); 123 Cong. Rec. 29,385 (1977) (Sen. Williams) ("The central purpose of the bill is to require that women workers be

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More important, it would contravene the plain text of the statute.

2. ADA-Qualifying Disabilities

As the court of appeals acknowledged, "UPS offers light duty work" as a reasonable accommodation to drivers who have "a permanent impairment cognizable under the ADA." Pet. App. 4a. The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). UPS's refusal to accommodate Young occurred before the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, expanded the definition of disability. But even prior to the ADAAA, numerous medical conditions that imposed lifting restrictions also satisfied the ADA's disability definition. See, *e.g.*, *Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008) (finding a triable issue that plaintiff's heart condition was an ADA disability based on testimony "that he had labored breathing 'on and off all the time' and that the labored breathing stopped him from doing work that required too much exertion such as jobs that require 'loading or unloading

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treated equally with other employees on the basis of their ability or inability to work."); *id.* at 29,662 (Sen. Cranston) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees – and when they are not able to work for medical reasons they must be accorded the same rights, leave privileges, and other benefits as other employees who are medically unable to work.").

trailers or sorting' or extended physical activity such as lifting"). Indeed, in some cases 10- to 20-pound lifting restrictions – like the one Young's doctor and midwife imposed – themselves constituted substantial limitations in the major life activities of lifting or working. See, *e.g.*, *Burns v. Coca-Cola Enterprises, Inc.*, 222 F.3d 247, 253 (6th Cir. 2000) (upholding district court's conclusion that plaintiff's back injury, which caused a 23-pound lifting restriction and "precluded him from performing at least 50% of the jobs that he was qualified to perform," substantially limited the major life activity of working).

If her lifting restriction had resulted from an ADA-qualifying disability, UPS would have offered Young accommodated work. But because her restriction resulted from her pregnancy – which is not an "impairment" and thus cannot be an ADA disability, see 29 C.F.R. Pt. 1630 App. § 1630.2(h) – the company refused to provide her the same treatment. That violates the plain text of the PDA.[13]

The court of appeals asserted that Young was not similar to drivers who had ADA disabilities because "her lifting limitation was temporary and not a significant restriction on her ability to perform major

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[13] The EEOC's position, again, is in accord. See EEOC Enforcement Guidance, *supra*, § I.A.5. (PDA requires accommodating pregnant worker where "reasonable accommodations (including exceptions to policies) are provided under the ADA to individuals with disabilities who are similar to a pregnant worker in terms of their ability or inability to work").

life activities." Pet. App. 27a. But, once again, the only relevant question under the PDA is whether she was similar to those drivers "in [her] ability or inability to work." 42 U.S.C. § 2000e(k). That Young's restriction was temporary is irrelevant to the PDA. At the time she sought an accommodation, Young's ability to work was the same as that of a driver with an ADA disability that imposed a 20-pound lifting restriction – neither could perform job tasks that required lifting more than 20 pounds. Moreover, even before the enactment of the ADAAA, the ADA required employers to accommodate temporary lifting restrictions if they resulted from long-term or permanent disabilities that were otherwise substantially limiting.[14]

Nor is it relevant whether Young's restriction substantially limited her ability to perform major life activities. Unlike the PDA, which focuses entirely on the effects of a condition on the ability to work, the ADA's concept of "major life activities" includes a range of activities that may have nothing to do with the ability to work. See, *e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (reproduction is a major life activity). Indeed, prior to the ADAAA this Court expressed doubts that working could even be considered a major life activity. See *Toyota Motor Mfg., Ky., Inc.*

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[14] See 42 U.S.C. § 12112(b)(5)(A) (requiring reasonable accommodation "to the known physical or mental limitations" – not *substantial* limitations – "of an otherwise qualified individual with a disability").

v. Williams, 534 U.S. 184, 200 (2002).[15] For purposes of the PDA, the relevant question is whether Young was similar *in the ability to work* to a driver with an ADA disability that imposed a 20-pound lifting restriction – not whether she was similar in the ability to perform *other* life activities.

That UPS provided light duty to workers with ADA disabilities in response to an independent legal mandate does not change this conclusion. The plain text of the PDA says that pregnant workers "shall be treated the same" as nonpregnant workers who are similar in their ability to work. 42 U.S.C. § 2000e(k). That text says nothing about the *reason* an employer provides accommodation to nonpregnant workers. See *Johnson Controls*, 499 U.S. at 199 ("explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). It contains no exception for cases in which the employer does so in response to an independent legal obligation. The courts have no power to read an unexpressed exception into the statute's unqualified text. See *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

If an employer were exempt from the PDA's same-treatment requirement because it responded to

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[15] The ADA now specifically defines "major life activities" to include "working." 42 U.S.C. § 12102(2)(A).

external legal obligations like the ADA, the consequences would be perverse: Every step taken by Congress and state legislatures to broaden the accommodations provided to nonpregnant employees with work limitations would come at the direct expense of pregnant workers. Prior to the ADA's enactment, many employers voluntarily accommodated workers with disabilities; the ADA made those accommodations mandatory. Prior to the ADAAA's enactment, many employers voluntarily accommodated workers whose conditions fell just outside the ADA's disability definition; the ADAAA made those accommodations mandatory as well. If employer responses to external legal obligations were exempt from the same-treatment requirement, then each of those enactments would have actually *reduced* the duties those employers owed to pregnant workers: The day before the new statutes took effect, the voluntary accommodations set a baseline of treatment that the employers were required to extend to pregnant workers; but the day after, they would no longer be required to provide pregnant workers the same accommodations. That is not a result properly attributed to a statute whose sponsors intended to ensure that pregnant workers are treated as valued rather than marginal employees, see pp. 18-19, *supra* – particularly in the complete absence of textual support.

Indeed, this Court has already concluded that an external legal obligation can set the baseline for the same-treatment required by the PDA. In *CalFed*, *supra*, the Court addressed a California statute that required employers to provide pregnancy leave.

Employers challenged that law on the ground that it required them to provide *better* treatment to pregnant workers than to nonpregnant employees with disabling conditions that had a similar effect on their ability to work. The Court rejected that argument. The Court first concluded that the PDA did not forbid employment practices that (in the narrow circumstances addressed by the California law) grant a special benefit to pregnant women. See *CalFed*, 479 U.S. at 285-290. It then went on to hold that, even if the "shall be treated the same" language required employers to provide nonpregnant employees every benefit that they provide to pregnant workers, there was no conflict between the PDA and the California law: "Employers are free to give comparable benefits to other disabled employees, thereby treating 'women affected by pregnancy' no better than 'other persons not so affected but similar in their ability or inability to work.'" *Id.* at 291 (quoting 42 U.S.C. § 2000e(k)). This aspect of the Court's holding was the only one that Justice Scalia endorsed in his *CalFed* concurrence. See *id.* at 296 (Scalia, J., concurring in the judgment). A necessary premise of the Court's and Justice Scalia's analysis is that independent legal obligations can set a baseline of treatment that the PDA requires to be extended to pregnant and nonpregnant workers equally.[16]

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[16] Moreover, at the time Congress enacted the PDA, "several states mandated employers provide temporary disability benefits but permitted pregnancy to be treated less favorably than

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Regardless of whether the company was acting in response to an external legal obligation, the PDA required UPS to treat pregnant drivers "the same" as it treated drivers with ADA disabilities who were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By refusing to accommodate Young's pregnancy, UPS violated that requirement.

3. Conditions Rendering Drivers Ineligible for DOT Certification

In addition to those with on-the-job injuries and ADA disabilities, UPS provides accommodated work to drivers with medical conditions that temporarily render them ineligible to drive a commercial motor vehicle. These conditions include many (such as limb impairments, neuromuscular disease, heart disease, and hypertension) that may impose the same lifting restriction that Young faced. See pp. 6-9, *supra*. UPS states that the alternative jobs it provides to drivers ineligible for DOT certification are "not necessarily the light duty work petitioner requested." Resp. Supp. Br. 5. The company's hedging language is telling. The summary judgment record contains a number of examples of drivers who were temporarily ineligible

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other disabilities," but the committee reports "make clear that employers could no longer make such distinctions – pregnancy would need to be treated like any other disabling condition." Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 997 (2013).

for DOT certification, and whom UPS accommodated by relieving them of lifting duties. See pp. 8-9, *supra*. These drivers were similar to Peggy Young in their ability or inability to work, but – because pregnancy is not a condition that renders a driver DOT-ineligible[17] – UPS denied her the same treatment. That, again, violated the plain text of the PDA.

The court of appeals gave two reasons for concluding that UPS was not required to treat Young the same as it treated drivers who were ineligible for DOT certification. First, the court said, Young was different because "no legal obstacle stands between her and her work." Pet. App. 27a. Second, the court suggested, drivers ineligible for DOT certification "maintained the ability to perform any number of demanding physical tasks, while Young labored under an apparent inability to perform tasks involving lifting." Pet. App. 28a. These arguments are unavailing.

To begin with, the relevant question under the PDA is whether Young and DOT-ineligible drivers were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Along *that* dimension, Young was similar to those drivers. Contrary to the court of appeals' suggestion, many of the conditions that render a driver ineligible for DOT certification impose restrictions on lifting, and UPS in fact accommodated a number of DOT-ineligible drivers by reassigning

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[17] See 49 C.F.R. § 391.41(b) (listing conditions that disqualify a driver, none of which includes pregnancy).

them to jobs that did not require heavy lifting. See pp. 7-9, *supra*. The PDA required UPS to give the same treatment to Young, who faced similar restrictions on her ability to work.

Moreover, it is not true that all UPS drivers who are ineligible for DOT certification face a "legal obstacle" to continued driving for the company. By law, the DOT's requirements apply only to drivers of trucks that weigh more than 10,000 pounds. See 49 U.S.C. § 31132(1)(A); 49 C.F.R. § 391.41(a)(1)(i). But many UPS drivers, like Peggy Young, operate vans and smaller trucks that are not subject to those DOT requirements. See *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 983 (9th Cir. 2007) (*en banc*). To the extent that the drivers of those smaller vehicles must comply with the DOT requirements, that is the result of UPS's own policy and not any legal mandate. See *id.*

Even if most of the drivers who become ineligible for DOT certification do face a legal obstacle to continuing in their current assignment, that only highlights the discriminatory nature of UPS's policy. After all, the DOT rules simply forbid a medically ineligible individual from operating a covered vehicle. They do not require an employer to find another, nondriving job for a driver who becomes ineligible.[18]

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[18] Some drivers rendered ineligible for DOT certification also have disabilities entitling them to accommodation under the ADA. But not all of them do – a point that was especially important during the pre-ADAAA period in which this case

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In the American system of at-will employment, when an employee becomes legally ineligible to perform the job for which he or she was hired, the employer is – absent some external legal obligation – perfectly within its rights to fire that worker or place the worker on leave without pay.

By binding itself, in the collective bargaining agreement, to find a temporary alternative position for medically ineligible drivers, UPS has given those drivers a benefit that the law does not require. As a manager testified below, UPS has done so for a simple business reason: By reassigning temporarily ineligible drivers while they work to reacquire their eligibility, UPS keeps valuable knowledge within the company and saves the time and expense of hiring and training new drivers. See p. 9, *supra*. But pregnant drivers are no different in this respect. The very same business reasons would justify temporarily reassigning pregnant drivers. By failing to provide pregnant drivers the same treatment it provides drivers who are ineligible for DOT certification, UPS has demonstrated that it does not "regard [pregnant drivers] as valued, career employees." 123 Cong. Rec. 10,582 (Rep. Hawkins). It has violated both the letter and the purpose of the PDA.

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arose. See, *e.g.*, *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 522-525 (1999) (driver unable to qualify for DOT certification due to hypertension had no ADA disability).

C. Even if This Court Applies the Analysis of *McDonnell Douglas v. Green*, it Should Reverse

As we have shown, the summary judgment record contained sufficient evidence from which a trier of fact could conclude that UPS failed to treat Peggy Young the same as three sizeable classes of drivers who were "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Because the evidence that pregnant and nonpregnant workers were not treated the same appears directly in the record – and, indeed, is reflected in UPS's formal, written policies – there is no need for this Court to resort to the judicially-crafted burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, *supra*. The *McDonnell Douglas* analysis is "a flexible evidentiary standard" that "does not apply in every employment discrimination case." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511-512 (2002). The "entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring in the judgment). But UPS's violation of the statute is apparent without any inquiry into intent. As with the transfer policy this Court considered in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), UPS's accommodated-work policy "is discriminatory

on its face," and the *McDonnell Douglas* analysis is unnecessary.[19]

Even if this Court does apply the *McDonnell Douglas* analysis, it should still reverse. The court of appeals recognized that Young had satisfied the first three elements of the *prima facie* case: she "fell within the protected class, raised at least a genuine issue of material fact regarding her job performance, and suffered an adverse employment action when she could not continue working." Pet. App. 26a. See *McDonnell Douglas*, 411 U.S. at 802 (setting forth components of the *prima facie* case). The court concluded, however, that Young could not establish "the final element of the prima facie case: whether similarly-situated employees outside the protected class received more favorable treatment than Young." Pet. App. 26a.

But that conclusion rested entirely on the premise that pregnant workers could not be properly compared "to employees accommodated under the ADA, drivers who have lost their DOT certification for medical reasons, and employees injured on the job."

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[19] The EEOC, again, agrees. See EEOC Enforcement Guidance, *supra*, at § I.C.1.c. ("A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green* in order to establish a violation of the PDA where there is * * * evidence that a pregnant employee was denied a light duty position provided to other employees who are similar to the pregnant employee in their ability or inability to work.") (footnote omitted).

Pet. App. 27a. For the reasons explained above, that premise conflicts with the plain text of the PDA. See pp. 30-46, *supra*. That text requires courts to compare pregnant workers to others – like the employees in the three categories UPS accommodates – who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That is precisely what the court of appeals refused to do. As a result, the court erred in concluding that Young had failed to establish a *prima facie* case.

Young presented sufficient evidence to defeat summary judgment on the second and third steps of the *McDonnell Douglas* analysis as well. UPS gave one reason for refusing to accommodate Young's lifting restriction – that the company had a policy of accommodating limitations resulting from on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions, but not those resulting from pregnancy. For the reasons explained above, see pp. 20-30, *supra*, the PDA's plain terms are inconsistent with considering that policy to be a "legitimate, nondiscriminatory reason." *McDonnell Douglas*, 411 U.S. at 802. As a result, Young presented sufficient evidence to defeat summary judgment without reaching the pretext stage of the analysis. See *id.* at 802-807.

In any event, the record contains ample evidence of pretext. That evidence includes the large number of circumstances other than pregnancy in which UPS provides accommodated work; a shop steward's testimony that "[t]o the best of [her] knowledge, the only light duty requested restrictions that became an

issue" in her workplace "were with women who were pregnant," J.A. 504; and the statement of Young's division manager that "she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant.'" Pet. App. 8a. Even if this Court considers the *McDonnell Douglas* analysis appropriate here, it should therefore still reverse the grant of summary judgment to UPS.

D. UPS's Collective Bargaining Agreement Does Not Relieve the Company of Liability

In its brief in opposition to the petition for *certiorari* (at 13), UPS argued – for the first time in any paper filed in this case – that Young's claim is barred by Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of," *inter alia*, "sex." *Id.* As we explained in our reply brief in support of the petition (at 6-7 & n.7), the Section 703(h) argument, which was neither raised nor decided below, is not properly before this Court. In any event, providing accommodated work to Young would not impermissibly override the company's collectively-bargained seniority system.

First, providing accommodated work to Young pursuant to the PDA would not violate UPS's collective bargaining agreement. The CBA specifically provides that "[a] light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. As we have shown, the PDA requires UPS to give pregnant drivers "the same" light-duty accommodations as it gives drivers with on-the-job injuries, ADA disabilities, and DOT-disqualifying conditions who are "similar in the[ ] ability or inability to work." 42 U.S.C. § 2000e(k). Thus, the CBA required the company to grant Young's light-duty request "in compliance with * * * federal law[ ]." It is irrelevant that UPS took the erroneous position that the PDA did not require it to accommodate pregnant drivers with similar work restrictions to those experienced by the drivers whom it did accommodate. By the plain terms of the statute, federal law required it to accommodate those pregnant drivers. And by the plain operation of the CBA, such accommodations did not breach the seniority system.

Second, even absent the CBA's "compliance with state or federal law" provision, granting Young's accommodation request would not have violated UPS's seniority system. For one thing, UPS could have fully accommodated Young without reassigning her to a different position, by simply allowing her to remain in her current assignment and trade heavier packages to willing co-workers. As the testimony at summary judgment showed, that practice of trading packages

was common in Young's workplace. See pp. 11-12, *supra*. Had UPS granted that accommodation, no seniority interests of other employees would have been implicated. And even if the company had temporarily reassigned Young to a non-driving job that did not require heavy lifting, the reassignment would have been unlikely to displace a more senior employee. The testimony at summary judgment indicates that light-duty reassignments at UPS typically did not displace other employees, but instead filled positions that were already open. See p. 9, *supra*; DCt. Dkt. 76, Att. 20 at 17. This case is thus dispositively unlike *Trans World Airlines v. Hardison*, *supra*, in which the record made clear that granting the plaintiff's request to be relieved of Saturday work would have displaced a more senior worker. See *Hardison*, 432 U.S. at 80.

Third, if accommodating Young would have violated UPS's collective bargaining agreement, the agreement would not have established a "bona fide" system protected by Section 703(h). The CBA does not dictate that all job assignments will be made on the basis of seniority. Rather, it makes exceptions to the company's seniority system for three sizeable classes of drivers with work limitations. Cf. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002) (exceptions to a seniority system can make it reasonable to override that system). The drivers who benefit from those exceptions experience limitations that are similar to those experienced by pregnant drivers like Young. If the CBA does not permit the company to "treat[ ]" those pregnant drivers "the same," then the CBA by

its terms violates the PDA. As this Court explained in *Hardison*, 432 U.S. at 79, "neither a collective-bargaining contract nor a seniority system may be employed to violate the statute."[20]

Section 703(h) protects some seniority systems that freeze into place the effects of past discrimination. See *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 761 (1976); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 352-353 (1977). It does not protect employers where fresh discrimination appears on the face of the seniority system itself. In *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), for example, this Court concluded that the employer was protected by Section 703(h) when it "pa[id] pension benefits calculated in part under an accrual rule, *applied only prior to the PDA*, that gave less retirement credit for pregnancy leave than for medical leave generally." *Id.* at 704 (emphasis added). But the Court made clear that it was only because the accrual rule was "a permissible differentiation given the [pre-PDA] law at the time" that the rule complied with "the subsection (h) bona fide requirement." *Id.* at

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[20] Where the employer's duty is to provide only reasonable accommodation – as in *Hardison* itself – incompatibility with a seniority system may render the plaintiff's requested accommodation unreasonable. See *Hardison*, 432 U.S. at 81; *US Airways*, 535 U.S. at 402-403. But the PDA does not require reasonable accommodation. It requires that pregnant workers "be treated the same" as nonpregnant workers "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The employer's own treatment of similarly limited employees thus sets the terms of the treatment it must provide to pregnant workers.

712.[21] A system that had unlawfully "discriminatory terms," by contrast, would not have been "bona fide." *Hulteen*, 556 U.S. at 710. To the extent that UPS's seniority system denies accommodated work to pregnant women while granting it to "persons not so affected but similar in their ability or inability to work," 42 U.S.C. § 2000e(k), it contains discriminatory terms that work a fresh violation of the PDA. It thus is not a bona fide seniority system protected by Section 703(h).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SHARON FAST GUSTAFSON
ATTORNEY AT LAW, PLC
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sharon.fast.gustafson@gmail.com

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI 48109
(734) 647-7584
sambagen@umich.edu

[21] See also *Teamsters*, 431 U.S. at 355 (holding, in race discrimination case, that seniority system was "bona fide" because it "applie[d] equally to all races and ethnic groups").

RESPONDENT'S BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT

CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
(212) 351-4000

MARK A. PERRY
Counsel of Record
MARISA C. MALECK
KELLAM M. CONOVER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

RACHEL S. BRASS
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
(415) 393-8200

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS P.C.
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

Counsel for Respondent

QUESTION PRESENTED

Whether UPS violated the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964 when it treated petitioner the same as employees with similar restrictions resulting from off-the-job injuries or conditions.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that:

United Parcel Service, Inc. is a publicly traded corporation, and no public company owns 10% or more of its stock.

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STATEMENT

When petitioner became pregnant, her health care providers imposed a lifting restriction that precluded her from performing an essential function of her job as a UPS delivery driver. Petitioner was not eligible for a light-duty work assignment under UPS's then-applicable accommodations policy. Petitioner sued UPS under Section 703 of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (42 U.S.C. § 2000e-2(a)(1) (PDA)), alleging that UPS had intentionally discriminated against her because she was a pregnant woman. The district court, after determining that no material facts were in dispute, applied settled law to grant summary judgment for UPS. Pet. App. 57a, 62a-63a. Consistent with every other court to have considered a similar issue, the Fourth Circuit affirmed. *Id.* at 29a.

1. UPS is the world's largest package delivery company. In the United States, UPS operates a large fleet of vehicles to transport packages between customer homes and offices, UPS service centers, airports, and transfer facilities. Much of UPS's workforce is organized by the International Brotherhood of Teamsters, and the terms of employment for union members are addressed in an extensively negotiated collective bargaining agreement (CBA), which specifies circumstances under which UPS may provide accommodations to drivers who become unable to perform essential functions of their jobs. J.A. 544-67. Petitioner was a member of the Teamsters union. Pet. App. 34a.

UPS employed petitioner in Maryland as an "air driver," a position that involved loading packages onto vehicles, transporting them, and then unloading

them for delivery to customers and at UPS's service centers. Petitioner acknowledges that an essential function of her position was the ability to lift packages weighing up to 70 pounds. J.A. 123, 541-42, 574, 578. Although petitioner now contends that her coworkers sometimes helped her lift heavier packages (Pet. Br. 11), she admitted below that she lifted packages weighing up to 70 pounds. Pet. App. 33a; *see also* J.A. 97, 126. Other air drivers acknowledged that they, too, regularly lifted and moved packages weighing over 20 pounds and up to 70 pounds. J.A. 366, 369, 424, 528.

In July 2006, petitioner took a leave of absence to become pregnant via in vitro fertilization. Pet. App. 5a. Her health care providers recommended in writing that she should not lift more than 20 pounds. J.A. 182 (midwife), 580 (doctor). When she sought to return to work, petitioner brought this restriction to the attention of Carolyn Martin—UPS's occupational health manager, and the only person with authority to grant petitioner an accommodation. *Id.* at 186, 575, 687, 691. Although Ms. Martin "empathized with [petitioner's] situation and would have loved to help her" (Pet. App. 7a (alteration and internal quotation marks omitted)), she explained that UPS's then-applicable policy did not allow her to provide petitioner with a "light duty" assignment. J.A. 87.

The CBA specifies that UPS may make alternative assignments available to four categories of workers. J.A. 254.

First, UPS provides temporary alternative work assignments (TAW), if available, to employees who are unable to perform their regular jobs because of injuries sustained on the job. Pet. App. 34a; J.A. 254, 547. UPS designs these "work hardening"

assignments to help those injured on the job "[re]build their muscles" so that they will no longer "have weight restrictions" and therefore can resume "their normal job responsibilities" as soon as possible. J.A. 254, 569. TAW assignments are generally limited to 30 days (*id.* at 267, 569), with a few exceptions if the employee's doctor states that the employee will be able to return to regular work within a short time frame (usually one or two additional weeks). *Id.* at 269.

Second, the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, requires UPS to provide reasonable accommodations for an employee who has a cognizable impairment. Pet. App. 34a; J.A. 548-49. UPS crafts ADA accommodations on a "case-by-case basis" (J.A. 548-49), depending on what is reasonable under the circumstances, which means a disabled employee may or may not receive a light-duty accommodation. *Id.* at 570.

Third, UPS will provide an "inside" job to drivers who lose their Department of Transportation (DOT) certification because of a failed medical examination, a revoked or suspended driver's license, or involvement in a motor vehicle accident. J.A. 553-54, 565. "Inside" jobs are not necessarily performed "inside." Pet. App. 36a n.5. Rather, employees accommodated with an "inside" job are assigned "whatever [non-driving] job is available that [UPS] has room to put them into" until their DOT certification is restored and they can return to regular driving duties. J.A. 260. These "inside" jobs often involve heavy lifting work and include "anything from a loader to an unloader, to a sorter." *Id.* at 261. Some employees who lose their DOT certifications "r[i]de along with [o]ther driver[s]" and continue to deliver packages

over 20 pounds. *Id.* at 387-88, 439. To be sure, some "inside" *tasks* do not require heavy lifting (Pet. Br. 8-9), but an employee provided an "inside" *job* accommodation must be physically able to perform all the essential functions of that position, often moving between tasks that do and do not include heavy lifting. J.A. 269-70, 274, 281. Thus, a driver with a 20-pound lifting restriction is not qualified to perform "inside" work. *Id.* at 304-06. In short, "inside" work is *not* "light duty," and there is nothing in the record suggesting that those who received "inside" jobs performed only light-duty tasks.[1]

Fourth, Article 16, Section 4 of the CBA specifically deals with maternity and paternity issues. For pregnancy-related lifting or other physical restrictions, UPS may grant a "light duty request certified in writing by a physician in compliance with state or federal laws if applicable." J.A. 355, 555. This policy was adopted well before this litigation, in light of legislation in some States requiring employers to provide light-duty work to pregnant employees. At the time of the events in question, Maryland had not yet adopted such legislation. *Id.* at 360-61, 651-52.

When petitioner sought to return to work, UPS accommodated pregnant women who fit into any of

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[1] For example, the employee whom petitioner characterizes as having been "reassigned to a clerk's position making phone calls" (Pet. Br. 9) testified that she "had to lift" from "twenty-five to forty packages a day over twenty-five–twenty pounds." J.A. 405-06. All of the other "examples" offered by petitioner similarly required lifting of heavy packages. *Compare* J.A. 647 *with id.* at 366; *see also id.* at 448-49.

these categories. For example, UPS accommodated pregnant women who had suffered an on-the-job injury or whose physical condition amounted to a disability cognizable under the ADA. J.A. 576. If a pregnant driver lost her DOT certification because of a failed medical exam related to a condition arising out of pregnancy, she was "offered an inside job" until she was able to regain her certification, so long as she was physically able to perform the essential functions of that alternative position. *Id.* at 304, 694. And UPS provided light-duty work assignments to pregnant women where required under State law. *Id.* at 651.

Contrary to petitioner's unsupported speculation (Pet. Br. 31, 49), light-duty work assignments were not available under the policy to *any* employees who were unable to perform their normal work assignments due to lifting restrictions or other physical conditions that did not fall within one of the four categories of accommodations. Specifically, Ms. Martin's undisputed testimony was that she had "never approved or authorized any light duty or alternative job assignment" as an accommodation for those injured off the job (unless the resulting limitation amounted to a cognizable disability under the ADA). *Id.* at 570, 683.

For example, a driver with a lifting restriction due to a back injury sustained *off the job*, which was not an ADA-cognizable disability (*see Duncan* v. *Wash. Metro. Area Transit Auth.*, 240 F.3d 1110, 1114 (D.C. Cir. 2001) (en banc)), would not be eligible for an accommodation. Nor would a driver who could not lift 70 pounds due to illness or frailty, because that driver could not perform the essential functions of his or her position.

UPS's managers testified that these policies were uniformly enforced. *See* J.A. 264 ("if a person is hurt off the job, they are not able to work until they are able to return to work regular duty"); *id.* at 570 ("if a male employee injured himself engaging in recreational activities, yard work at home, or any other activity off the job and, as a result had a lifting restriction that made him unable to perform the essential functions of his regular job, the employee was not offered light duty or an alternative job assignment").

In denying petitioner's request for light-duty work, Ms. Martin relied solely on UPS's policy and the essential functions of petitioner's air driver job; she did not communicate or consult with anyone else. J.A. 684. Pursuant to that policy, Ms. Martin explained to petitioner that, because her lifting restriction did not result from an on-the-job injury, she was ineligible for a light-duty accommodation. Pet. App. 6a-7a. Ultimately, Ms. Martin "knew that [she] had to treat [petitioner] the same way [she] would treat any other bargaining unit employee with a similar restriction not resulting from an on-the-job injury, which meant that she was not entitled to light duty." J.A. 574-75.[2]

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[2] Petitioner alleges that Myron Williams, the Capital Division Manager, told her that she was "too much of a liability" while pregnant and that she could not come back to work "until [she] was no longer pregnant." Pet. App. 8a (alteration in original; internal quotation marks omitted). Mr. Williams denies he said this or anything like it. J.A. 691. This factual dispute is immaterial to the issue before this Court, however, because it is undisputed that Mr. Williams lacked the authority to grant

An employee whose physical restrictions preclude performance of an essential function of his or her job, but who is ineligible for an accommodation, must take a leave of absence. This leave policy treats pregnant women "the same as anybody else." J.A. 284, 571. All UPS "employees [a]re permitted to continue working as long as they wan[t] unless and until the employee present[s] a doctor's note or other medical certification that [he or] she ha[s] a restriction that render[s] [him or] her unable to perform the essential functions of the job." *Id.* at 571; *see also id.* at 284, 307, 480, 575-76. Consistent with that policy, UPS has permitted pregnant women without lifting restrictions to work throughout their pregnancy. *Id.* at 61, 103-04, 107, 409-10, 476, 478, 480, 529, 572, 637, 669-70. But because petitioner's health care providers had imposed such restrictions, she was required to take a leave of absence. Pet. App. 7a. Petitioner later returned to work at UPS. *Id.* at 8a.[3]

2. Petitioner filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that UPS's denial of the requested light-duty work accommodation constituted sex discrimination. Pet. App. 8a.

[Footnote continued from previous page]

petitioner an accommodation or to overrule Ms. Martin's decision. *Ibid.*

[3] Although petitioner contends that she lost her UPS insurance while on leave (Pet. Br. 13), she admitted below that she was fully insured through her husband's plan. *See* C.A. J.A. 1405-21.

After the EEOC issued a right to sue letter, petitioner brought suit for monetary relief under Title VII, as amended by the PDA. Pet. App. 8a-9a. That amendment defines sex discrimination to include discrimination "because of pregnancy" and clarifies that "women affected by pregnancy shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Petitioner alleged only disparate treatment; her request to add an untimely and unexhausted disparate-impact claim was denied by the district court. J.A. 239-40.[4]

Following extensive discovery, UPS moved for summary judgment. Pet. App. 9a. The district court ruled, based on the undisputed evidence in the record, that petitioner had not shown direct evidence of discrimination; failed to establish a prima facie case of disparate treatment because she could not identify a similarly situated comparator who received more favorable treatment; and could not show that UPS's nondiscriminatory application of a neutral policy was a mere pretext for discrimination. *Id.* at 9a-10a. The district court thus granted summary judgment to UPS.

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[4] Petitioner also raised an ADA claim and a race discrimination claim (on the theory that UPS accommodated black, but not white, pregnant employees). The district court granted summary judgment to UPS on both of these claims. *See* Pet. App. 9a & n.5. Petitioner does not challenge these rulings in this Court, nor does she challenge the preclusion of her disparate-impact claim.

3. The Fourth Circuit, in a thorough opinion by Judge Allyson Kay Duncan, affirmed. Based on the text and structure of the PDA, an exhaustive review of the record evidence, and the decisions of its sister circuits, the panel unanimously concluded that petitioner had raised no genuine issue of material fact calling into question the district court's grant of summary judgment to UPS. Pet. App. 17a-29a.

The court of appeals explained that each of the circuits to have considered the issue had held that an employer does not violate the PDA by denying a pregnant employee an accommodation or benefit pursuant to a pregnancy-blind policy like UPS's. Pet. App. 21-22a (citing *Troupe* v. *May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998)). The Fourth Circuit also expressed the concern that to adopt petitioner's position "would be to transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees." Pet. App. 22a.

SUMMARY OF ARGUMENT

The PDA amended Title VII to clarify that traditional anti-discrimination protections apply to pregnant women. It does not mandate accommodations or other special treatment for pregnant employees. Because UPS treated petitioner the same as it did other employees with similar lifting restrictions resulting from an off-the-job injury or condition, UPS

did not discriminate against petitioner on account of her pregnancy.

I. Petitioner asks this Court to declare that employers must provide accommodations to women with pregnancy-related lifting restrictions, even if similarly situated nonpregnant employees do not receive such accommodations. While this might make for good *policy*, it is not required by the PDA.

A. All three branches of the federal government have historically repudiated petitioner's reading of the PDA. Every Article III court to have considered petitioner's interpretation has rejected it. Congress, too, has declined to adopt as positive law the position petitioner advances. The Department of Justice also consistently rejected it in defending the United States Postal Service's accommodations policy, which was and is materially identical to the one challenged by petitioner here. Although the EEOC pulled a volte-face following the grant of certiorari here, its views do not bind employers or this Court.

B. Other federal and state laws may address the policy concerns that petitioner presses here. Following the events in this case, Congress amended the ADA—which, unlike Title VII, *is* an accommodations statute—to broaden the scope of covered disabilities. A number of States have gone further and expressly required employers to make accommodations for pregnant employees with lifting or other physical restrictions. It is thus increasingly unlikely that the scenario here will ever recur.

C. Although not mandated by federal law, UPS has elected to voluntarily provide pregnant women the same accommodations as other employees with similar physical restrictions resulting from on-the-

job activities. Accordingly, while UPS's denial of petitioner's accommodation request was lawful at the time it was made (and thus cannot give rise to a claim for damages), pregnant UPS employees will prospectively be eligible for light-duty assignments.

II. The text, history, and structure of the PDA establish that UPS did not intentionally discriminate against petitioner by equating pregnancy-related physical limitations with similar limitations resulting from off-the-job injuries or conditions for the purpose of providing accommodations.

A. The plain text of the PDA prohibits employers from treating female employees differently "because of" pregnancy. By its terms, the PDA (1) prohibits discrimination on the basis of pregnancy; and (2) precludes employers from singling out pregnant women for disfavored treatment. Petitioner asks the Court to ignore the first clause of the PDA and adopt an unprecedented interpretation of the second clause. But both clauses must be read together.

B. The Senate and House Reports on the PDA confirm that the amendment "defines sex discrimination, as proscribed in the existing statute, to include [pregnancy and related medical conditions]; it does not change the application of title VII to sex discrimination in *any other way*." S. Rep. No. 95-331, at 3-4 (1977) (emphasis added); H.R. Rep. No. 95-948, at 4 (1978). Statements by sponsors of the bill echo these sentiments and make clear that employers may lawfully distinguish between on- and off-the-job injuries.

C. Petitioner's contrary reading of the PDA cannot be squared with the structure of Title VII.

1. The placement of the PDA in Title VII generally, and in the "Definitions" provision of Title VII specifically, leaves no doubt that the PDA clarifies that discrimination on the basis of sex includes discrimination on the basis of pregnancy. Equating pregnancy-related physical restrictions with similar restrictions resulting from off-the-job activity is not discrimination "because of" sex.

2. Moreover, petitioner's reading of the PDA would call into question neutral employment distinctions—such as salaried versus hourly and full-time versus part-time, in addition to on-the-job versus off-the-job—that are not just well-established but fundamental to federal and state fair labor standards and workers' compensation laws. Indeed, petitioner's reading of the PDA would mandate special treatment for pregnancy, requiring an employer to provide an accommodation to a pregnant employee if the same accommodation has ever been provided to any other employee for any reason.

III. Under well-established Title VII principles, petitioner did not raise a genuine issue of material fact as to her disparate-treatment claim, as both courts below correctly concluded.

ARGUMENT

Because UPS denied petitioner an accommodation pursuant to a neutral, pregnancy-blind policy—and not because of petitioner's pregnancy—the courts below correctly concluded that UPS did not intentionally discriminate under the PDA.

I. PETITIONER'S ARGUMENTS ARE BASED ON POLICY, NOT LAW

The briefs filed by petitioner and her *amici* are paeans to what employers *should do* to accommodate

pregnancy; they do not describe what employers *must do* under the PDA. No Article III court has ever adopted the view espoused by petitioner, and to this day the United States—in its capacity as employer—applies an accommodations policy materially identical to the one challenged as intentionally discriminatory in this case. There may be sound *policy* reasons for adopting a different approach—as, indeed, UPS has elected to do on a prospective basis. But what makes for good policy must be distinguished from the dictates of positive law.

A. All Three Branches Of The Government Have Historically Rejected Petitioner's Reading Of The PDA

Petitioner's position is that "when an employer accommodates only a subset of workers with disabling conditions (such as those who experienced on-the-job injuries), the PDA's plain text requires that pregnant workers who are similar in the ability to work receive the same treatment even if still other nonpregnant workers do not receive accommodations." Pet. Br. 28. Petitioner thus reads the PDA to confer "most favored nation" status on pregnant employees, entitling them to pick and choose from any of the accommodations that an employer elects to provide to any other employee in the company, regardless of whether they are similarly situated in other respects, and irrespective of neutral distinctions that are fundamental to labor and employment law.

1. No Article III court has ever accepted the construction of the PDA advanced by petitioner in this Court. On the contrary, the courts have unanimously approved pregnancy-neutral policies such as the one petitioner challenges here.

Every court of appeals has ruled that "[c]laims brought under the PDA are analyzed in the same way as other Title VII claims of disparate treatment." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000); *see also Smith* v. *F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996); *Kerzer* v. *Kingly Mfg.*, 156 F.3d 396, 400-01 (2d Cir. 1998); *Doe* v. *C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008); *Young* v. *UPS*, 707 F.3d 437, 449-50 (4th Cir. 2013); *Urbano* v. *Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998); *Reeves* v. *Swift Transp. Co.*, 446 F.3d 637, 640-42 (6th Cir. 2006); *Serednyj* v. *Beverly Healthcare, LLC*, 656 F.3d 540, 547-48 (7th Cir. 2011); *Elam* v. *Regions Fin. Corp.*, 601 F.3d 873, 878 (8th Cir. 2010); *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1511 (9th Cir. 1989); *Armstrong* v. *Flowers Hosp., Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994); *Gleklen* v. *Democratic Cong. Campaign Comm.*, 199 F.3d 1365, 1367 (D.C. Cir. 2000). In other words, petitioner must prove that she suffered unfavorable treatment *because of* her pregnancy.

And no Article III court to consider the issue has ever accepted petitioner's view that the PDA requires an employer to accommodate a woman with a pregnancy-related lifting restriction if it makes some sort of accommodation for any other employee for any other reason, or that failure to do so constitutes discrimination "because of" pregnancy. *See, e.g.*, *Young*, 707 F.3d at 449-50; *Urbano*, 138 F.3d at 208; *Reeves*, 446 at 640-42; *Serednyj*, 656 F.3d at 548-49; *Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191; *Spivey* v. *Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999).

Petitioner does not address any of these appellate decisions in her merits brief. In fact, she even ignores the one case—*Ensley-Gaines* v. *Runyon*, 100 F.3d 1220 (6th Cir. 1996)—that she asserted conflicted with these decisions at the certiorari stage. That is undoubtedly because, as the Solicitor General has explained, the claim petitioner raises has been rejected by every court to consider the issue, including the Sixth Circuit. *See* U.S. Cert. Br. 17-19. Petitioner is thus advancing a legal theory that has never been accepted by any court anywhere. That is an important indicator of its incorrectness.

2. Congress, which is presumed to be aware of the consistent interpretation of the PDA by the courts of appeals (*Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988)), has declined to adopt as positive law the position advanced by petitioner in this Court. Members of Congress have attempted—and failed—to mandate accommodations for pregnant women akin to what petitioner asks for in this case. *See, e.g.*, Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2013) (not enacted); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012) (not enacted); S. 942, H.R. 1975, 113th Cong. (2013) (pending in committee). If petitioner's proposed construction of the PDA were correct, these bills would have been entirely unnecessary. *Cf. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

3. The Executive Branch has historically rejected the position advanced by petitioner in this Court.

a. Time and time again, the Department of Justice has stated that petitioner's reading of the PDA is "simply incorrect" and "runs counter" to this Court's precedents holding that the PDA is a mere "*definitional* amendment to Title VII" whose sole purpose is

to clarify that sex discrimination includes discrimination on the basis of pregnancy. Gov't Br., *Ensley-Gaines* v. *Runyon*, 1995 WL 17845805, at *26-27 (6th Cir. 1995) (emphasis added). Indeed, the Justice Department has gone so far as to call petitioner's reading of the PDA "frivolous" (Gov't Br., *Frank* v. *White*, No. 92-1579, 1992 WL 12126463, at *8 (4th Cir. 1992)) and "contrived" (Gov't Br., *Guarino* v. *Potter*, No. 03-31139, 2004 WL 3020921, at *7 (5th Cir. 2004)).

When its own ox was being gored, the government rejoined that the PDA's text does "not relieve plaintiffs of [their] obligation" to "prove intentional discrimination occurred." Gov't Br., *Ensley-Gaines*, 1995 WL 17845805, at *17-18 (internal quotation marks omitted). "Nor did it introduce new substantive provisions," the government noted; instead, "the amendment brought discrimination on the basis of pregnancy within the existing framework prohibiting sex-discrimination." *Id.* at *18 (internal quotation marks omitted). In doing so, the government stressed, "[t]he standard by which a pregnancy discrimination claim is measured requires the *same* type of analysis used in other Title VII sex discrimination suits." *Ibid.* (emphasis added). Accepting the precise position petitioner advances, the government warned, would "confe[r] additional, substantive rights to pregnant employees, beyond the right to nondiscriminatory treatment afforded to all employees protected under Title VII." *Id.* at *17.

The government consistently defended the Postal Service's accommodations policy—which is materially identical to the UPS policy petitioner challenges as intentionally discriminatory—on the ground that "a distinction between injuries/illnesses incurred off-

the-job versus those incurred on-the-job is legal, so long as it is applied equally." Gov't Br., *Guarino*, 2004 WL 3020921, at *12; Gov't Br., *White*, 1992 WL 12126463, at *9 ("Plainly, however, it is not pregnancy discrimination to distinguish between employees who suffer on-the-job injuries and those who suffer off-the-job injuries"). If the argument petitioner advances here were accepted, the government explained, "pregnant employees [would receive] preferential treatment over other workers with non-occupational injuries/illnesses." Gov't Br., *Guarino*, 2004 WL 3020921, at *12-13.

b. To this day, the Postal Service "*continues* to offer different treatment to employees with on-the-job injuries than to employees with pregnancy-related limitations and employees with disabilities more generally." U.S. Br. 17 n.2 (emphasis added). Tellingly, petitioner says nary a word about the Postal Service's policy.

If UPS's former policy was a *per se* violation of the PDA, as petitioner contends, the Postal Service surely would be doing more than merely "considering its options with respect to [its] policies." U.S. Br. 17 n.2. The very fact that the government has not forsworn its own policy demonstrates that petitioner's construction is not compelled by the PDA.

The Solicitor General does not concede that the government-as-employer is intentionally discriminating against pregnant Postal Service workers, and has been since the PDA was enacted in 1978. And, since the government still defends the Postal Service policy, it should not be heard to attack or criticize UPS's materially identical policy. The government-as-employer is subject to Title VII (*see* U.S. Br. 1); if

the Postal Service's policy is lawful, then so too must be UPS's.

c. Two weeks *after* the Court granted certiorari in this case, the EEOC issued new enforcement guidance on pregnancy-related accommodations. Pet. Br. 22-23, 32-33, 38, 48-49; U.S. Br. 3-4, 25-27. That guidance represented a material about-face from the approach that the federal government had previously taken to the issue presented by petitioner since the adoption of the PDA almost forty years ago.

i. The EEOC previously (if implicitly) denied that a policy similar to UPS's violated the PDA. *See Horizon/CMS Healthcare Corp.*, 220 F.3d at 1191 (noting that the Commission "abandoned" the argument that a similar policy "constituted direct evidence of discrimination"). And contrary to petitioner's contention (Pet. Br. 21-22), the agency did not previously endorse the view it now advances. To be sure, the previous guidance provided that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." 29 C.F.R. pt. 1604 app. (1979), Questions and Answers on the Pregnancy Discrimination Act, Question 5; *see also* EEOC Compliance Manual § 626.4 Right to Work, 2006 WL 4673391. But it did not expressly contemplate the situation here, where only some temporarily disabled employees are relieved (those injured on the job), but others (those injured off the job) are not. Interpretive decisions, however, made clear that such a distinction is lawful. *See, e.g.*, *Webb* v. *Frank*, 1991 WL 1187564, at *3-4 (EEOC, Aug. 28, 1991).

ii. The EEOC's new guidance points in a decidedly different direction. In particular, the guidance

states that "[a]n employer may not rel[y] on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)." Enforcement Guidance, § I.A.5. The EEOC also posited the following "hypothetical" as one in which the employer "violated the PDA" and engaged in "disparate treatment":

> An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request[.]

Enforcement Guidance, § I.C.1.b, Example 10.

iii. The EEOC's new guidance prompted vigorous dissents from two of the five EEOC Commissioners. *See* Statement of the Hon. Victoria A. Lipnic, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014) ("Lipnic Statement"); Constance S. Barker, Statement, *Issuance of Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014) ("Barker Statement"); Constance S. Barker, Memorandum, *Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014* (May 23, 2014) ("Barker Memo").

These two Commissioners denounced the guidance as a "fatal[ly] flaw[ed]" attempt to "jump ahead" of this Court with respect to *this case* and to "jump

the gun on Congress and expand the PDA to accomplish" what federal legislators have thus far declined to enact. Barker Statement at 1-2; Barker Memo at 3; *see also* Lipnic Statement at 1. Both Commissioners recognized that the enforcement guidance marked a "dramatic departure" from the EEOC's previous position (Barker Memo at 4; Lipnic Statement at 2), "without sound legal basis or rigorous analysis, and [without any] explanation for the reversal of long-standing Commission policy" (Lipnic Statement at 2).

The two dissenting Commissioners also admonished their colleagues for issuing guidance that "introduces an entirely new legal interpretation of the PDA that is unsupported by Congressional intent or court interpretation." Barker Memo at 1. Commissioner Barker criticized the other Commissioners for presenting petitioner's theory "as if it were settled law even though no legal authority is cited, because of course, none exists." *Ibid.* Commissioner Lipnic agreed that "no Circuit Court of Appeals" had adopted petitioner's position, "and indeed, most have flatly rejected it." Lipnic Statement at 2.

iv. The EEOC has no substantive rulemaking authority and its enforcement guidance is not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000); *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Indeed, the Solicitor General only invokes *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). U.S Br. 26. But it would be "entirely inappropriate" to give *any* weight to the EEOC's countertextual construction of the PDA, which is neither consistent nor reasonable, and which "appears to be

nothing more than" a "convenient litigating position" to shore up petitioner's reading. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). If applied retroactively, such an unexplained reversal of agency interpretation would cause "precisely the kind of 'unfair surprise' against which [this Court's] cases have long warned." *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (citation omitted). That the Postal Service has not adopted the EEOC's view is all the more reason to accord no deference to the agency's interpretation.

B. Other Federal And State Statutes May Address The Policy Concerns Petitioner Advances Here

As the government recognizes, "[t]he decisions whether to extend antidiscrimination protection to anyone, and to whom or in what circumstances, are quintessentially legislative judgments." U.S. Br. 11. And, indeed, both before and after this litigation commenced, legislative bodies have addressed the concerns that petitioner presents here. These legislative developments reflect the reality that the PDA provides a "floor," not a "ceiling," for pregnancy-related accommodations. *Cal. Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (internal quotation marks omitted).

1. As the government points out (U.S. Br. 24), the concerns expressed by petitioner in this case may already have been resolved at the federal level. Under the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), many more physical restrictions are treated as disabilities that employers must accommodate. 42 U.S.C. § 12101; 29 C.F.R. § 1630.2(i) & (j). Indeed, the government takes the position that pregnancy-

related lifting restrictions fall in this category. U.S. Br. 21, 24-25. In cases where the ADAAA applies, courts will have to determine the validity of this argument—which was not presented in this pre-ADAAA case. In light of the unquestionably broader scope of the ADA as amended, however, the scenario in this case may never be repeated. *See* U.S. Cert. Br. 20-21 (urging the Court to deny certiorari for this reason).

2. A number of States have adopted special protections for pregnant workers. *See, e.g.*, Cal. Gov't Code § 12945 (West 2012); Conn. Gen. Stat. § 46a-60(a)(7) (West 2011); 2014 Del. Laws Ch. 429 (S.B. 212) (approved Sept. 9, 2014); 2014 Ill. Legis. Serv. Pub. Act 98-1050 (H.B. 8) (West) (effective Jan. 1, 2015); La. Rev. Stat. Ann. § 23:342(4) (2012); Md. Code Ann., State Gov't § 20-609 (West 2013); Minn. Stat. Ann. § 181.9414 (West 2014); N.J. Stat. Ann. § 10:5-12(s) (West 2014); W. Va. Code Ann. § 5-11B-2 (West 2014). Pregnancy accommodation laws are pending in six more States, as well as the District of Columbia. *See* S. 417, 2014 Gen. Assemb. (Ga. 2014); H. 2102, 97th Gen. Assemb. (Mo. 2014); S. 05880-2013, 2013-2014 Assemb., Reg. Sess. (N.Y. 2013); H. 1892, 2014 Gen. Assemb. (Pa. 2014); Council 20-0769, 2014 Council (D.C. 2014); S. 401, 2013-2014 Leg. (Wis. 2013).

These statutes and bills (like their stalled federal counterpart) reflect a direct legislative solution to the *policy* concerns raised by petitioner. Indeed, four months after the court of appeals decided this case, Maryland enacted the Reasonable Accommodations for Disabilities Due to Pregnancy Act, S. 784, 2013 Gen. Assemb. (Md. 2013), which requires Maryland employers to provide accommodations for physical

limitations caused or contributed to by pregnancy. *See* Md. Code Ann., State Gov't § 20-609 (West 2013). As a practical matter, many employers like UPS will conform their practices to the more stringent standards imposed by these state laws, which are permissible under, but not compelled by, the federal PDA. *See Guerra*, 479 U.S. at 285.

C. UPS Has Elected As A Matter Of Corporate Discretion To Provide More Expansive Accommodations

With respect to the issue in this case, UPS has traditionally had the same policy as the Postal Service—the government agency that most closely resembles UPS in its operational aspects (delivering packages). Like the Postal Service, UPS has treated pregnant workers the same as other employees with physical restrictions resulting from off-the-job injuries or activities.

UPS cannot be faulted for following the same rules that the federal government has adopted and defended in its capacity as employer. *See, e.g.*, *Albertson's* v. *Kirkingburg*, 527 U.S. 555, 577 (1999) (employer did not act unlawfully by adopting a vision standard that the Department of Transportation had promulgated as a requirement for its truck driving positions); *see also Bates* v. *UPS*, 511 F.3d 974, 998 (9th Cir. 2007) (en banc) (UPS's reliance on a Department of Transportation hearing standard was "entitled to some consideration as a safety benchmark" in evaluating business necessity defense). That is particularly so since the courts of appeals have unanimously concluded that this policy does not violate the PDA.

On a going-forward basis, UPS has voluntarily decided to provide additional accommodations for pregnancy-related physical limitations as a matter of corporate discretion. UPS's new policy provides: "Light duty work will be provided as an accommodation to pregnant employees with lifting or other physical restrictions to the same extent as such work is available as an accommodation to employees with similar restrictions resulting from on-the-job injuries." *See* App., *infra*, at 2a.[5]

The purpose of this revised policy is to reinforce UPS's commitment to providing reasonable accommodations to pregnant workers. While this approach is not *required* by the PDA, UPS's revised policy is permitted under that statute and will aid operational consistency given that a number of States in which UPS operates have relatively recently mandated pregnancy accommodations. Accordingly, the question presented in this case will have no significance for any member of the UPS workforce after the new policy goes into effect on January 1, 2015.

The only question that remains is whether petitioner (who voluntarily left UPS in 2009, years after the events at issue) is entitled to compensatory relief on the ground that UPS's application of its previous policy to petitioner—a policy that conformed to judicial interpretations of the PDA and the government's own policy as employer—constituted inten-

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[5] As UPS previously noted (BIO 4), the CBA does not authorize disrupting the seniority system. Accordingly, TAW accommodations are made "provided the work is available" (J.A. 547), and pregnancy-related accommodations will be made on the same basis.

tional discrimination on the basis of sex. The answer is no, as explained next.

II. THE PDA DOES NOT PRECLUDE EMPLOYERS FROM AWARDING OR WITHHOLDING BENEFITS PURSUANT TO NEUTRAL CRITERIA

Congress enacted the PDA to "reestablish the principles of Title VII law as they had been understood prior to the [*General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976),] decision." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 679 (1983). Those principles have always mandated equal, not preferential, treatment of employees. *See Guerra*, 479 U.S. at 287. And they have always required proof of discriminatory intent to prevail on a claim of disparate treatment. *See, e.g.*, *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009). Although employers cannot single out employees for less favorable treatment because of a protected trait (*see, e.g.*, *id.* at 579-80), they can limit benefits to those employees on the same neutral terms and conditions as to other employees (*see, e.g.*, *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981)). That is all UPS did here.

Under these basic principles of disparate-treatment law, the decision below can only be affirmed. Recognizing as much, petitioner and her *amici* insist that the PDA adds "something more" to Title VII. Pet. Br. 23. But the text, history, and structure of the PDA all confirm that the PDA "does not really add anything to title VII." 123 Cong. Rec. 10,581 (1977) (Statement of Rep. Hawkins). The Act "defin[es] sex discrimination to include discrimination against pregnant women," but "does not change the application of title VII to sex discrimination in any other way." S. Rep. No. 95-331, at 4.

A. Text

The PDA amends Title VII by defining discrimination "because of" sex to include discrimination "because of" pregnancy, and then clarifies how traditional disparate-treatment principles apply to discrimination "because of" pregnancy. Consistent with these principles, the statute does not permit employers to place pregnancy in a class of its own for disfavored treatment. The policy challenged by petitioner fully complied with these textual requirements.

1. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). The congressional language at issue here is:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

Pub. L. No. 95-955, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k)).

Petitioner does not *interpret* this language, but leaps straight to asserting that its "import" is that an employer must provide a pregnant woman with any accommodation provided to *any* employee of compa-

rable physical work ability. Pet. Br. 20. All that is "plain" from the statutory text (*ibid.*), however, is that it clarifies that traditional disparate-treatment principles apply to pregnant women.

a. The PDA's first clause "add[s] pregnancy to the definition of sex discrimination prohibited by Title VII." *Guerra*, 479 U.S. at 284; *see Newport News*, 462 U.S. at 678. Specifically, it defines discrimination "because of" sex to include discrimination because of pregnancy.

By including pregnancy within the definition of "sex," the first clause effectively amends 42 U.S.C. § 2000e-2(a) to read: "It shall be an unlawful employment practice for an employer to discriminate against any individual with respect to [her employment] because of such individual's [pregnancy]." This prohibition on discrimination "because of" a protected trait means that that trait cannot "actually motivat[e] the employer's decision" to take a certain action. *Raytheon Co.* v. *Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted). Title VII thus requires the employer to use only neutral criteria to deny benefits. *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 612 (1993); *see Burdine*, 450 U.S. at 259.

b. As this Court has held, the second clause of the PDA "explains the application of the general principle [of equal treatment] to women employees." *Newport News*, 462 U.S. at 678 n.14. The PDA's second clause thus clarifies that an employer must disregard the fact that an employee is *pregnant* and treat her the same way it treats other similarly situated employees. This Court has described Title VII's mandate in strikingly similar language: "similarly situated employees are not to be treated differently solely because they differ with respect to [a

protected trait]." *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 71 (1977).

c. Taken together, the two clauses clarify that traditional Title VII equal-treatment principles apply to pregnant employees. Employers cannot *single out* pregnant employees for less favorable treatment. But they can apply the same neutral terms and conditions to pregnant employees as to other similarly situated employees. For example, an employer may offer certain benefits, such as paid leave, to full-time but not part-time employees. Denying paid leave to a part-time pregnant employee pursuant to that policy would not violate the PDA. Here, the fact that UPS denied light-duty work to "*other*" employees "not so affected" by pregnancy compels the conclusion that UPS did not treat employees differently "because of" pregnancy.[6]

The gravamen of petitioner's complaint is that she did not receive an accommodation available to one group of employees—those with a lifting restriction resulting from an on-the-job injury. But she was treated *exactly the same* as another group of employees similarly situated in their ability to work—those with a lifting restriction resulting from an off-the-job injury or condition. Nothing in the PDA *requires* UPS to align pregnant employees with one group or the other. The statute contains no "most favored nation" clause.

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[6] To be sure, such neutral policies could violate Title VII if they were shown to have a disparate *impact* on pregnant women. But petitioner did not preserve a disparate-impact claim.

2. Petitioner's main objection to applying the statute as written is that it "would render the PDA's second clause entirely superfluous" because the first clause already prohibits discrimination "because of" pregnancy. Pet. Br. 22-23. Petitioner contends that the second clause creates an independent and affirmative obligation to accommodate pregnant women. *Id.* But this reading ignores how the second clause interacts with the first, as confirmed by this Court's precedents.

a. *Gilbert*'s disparate-treatment holding, reasoning, and dissents confirm that the PDA prohibits employers from *singling out* pregnancy for disfavored treatment, but permits employers to deny benefits to pregnant employees on neutral, evenhanded terms. *Cf. Guerra*, 479 U.S. at 284-85 (interpreting PDA in light of *Gilbert*'s reasoning and holding); *Newport News*, 462 U.S. at 678-79 (interpreting PDA in light of *Gilbert*'s reasoning, holding, and dissents).

The disability plan at issue in *Gilbert* wholly exempted pregnancy and pregnancy-related illnesses from coverage in two ways. It "compensate[d] employees for all temporary disabilities except one"—those arising from pregnancy. *Gilbert*, 429 U.S. at 146 (Brennan, J., dissenting). And coverage for all disabilities, whether pregnancy-related or not, terminated only when an employee "cease[d] active work because of total disability or pregnancy." *Id.* at 129 n.4 (majority opinion). That is, once an employee left work because of pregnancy, she could not receive any benefits, even if she subsequently suffered an unrelated and otherwise covered nonoccupational illness or injury. *Ibid.* The disability plan in *Gilbert* thus was facially discriminatory

towards pregnant employees. *Ibid.*; *see Newport News*, 462 U.S. at 677-78.

The *Gilbert* majority upheld the plan after refusing to hold that discrimination "'because of sex'" encompassed discrimination because of pregnancy, reasoning that pregnancy was "often voluntarily undertaken" and not a "'disease at all.'" *Gilbert*, 429 U.S. at 136, 145-46 (citations omitted). The *Gilbert* dissenters, in contrast, argued that the policy "discriminate[d] on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *Id.* at 161-62 (Stevens, J., dissenting); *see id.* at 149 (Brennan, J., dissenting). The dissenters also pointed out that the "lone exclusion of pregnancy" from the benefits plans was not sex-neutral because pregnancy affected women alone. *Id.* at 151-52 (Brennan, J., dissenting); *see also id.* at 161-62 (Stevens, J., dissenting).

To overrule *Gilbert* and adopt the position taken by the dissents, Congress enacted two clauses within Title VII that work together. The first clause of the PDA equates pregnancy with sex. That change alone, however does not fully encompass the dissenters' view that placing pregnancy "in a class by itself" and thereby uniquely disadvantaging women was *inherently* discriminatory. 429 U.S. at 161 (Stevens, J., dissenting); *id.* at 151-52 (Brennan, J., dissenting). After all, any employer still could claim, as General Electric had done, that it was treating pregnancy differently from all other non-occupational conditions, not "because of pregnancy," but because pregnancy was "voluntary" or "temporary" or not a "disease" (or all of the above). *See id.* at 136 (majority opinion). To overrule *Gilbert*'s holding, then, Congress needed to add a second

clause clarifying that employers could not *single out* pregnancy for exclusion. And that is precisely what the second clause does. *See Guerra*, 479 U.S. at 285; *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans* v. *Norris*, 463 U.S. 1073, 1085, n.14 (1983) (Marshall, J., concurring) ("the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles"); *see Guerra*, 479 U.S. at 288-89 ("the PDA extends [Title VII principles and objectives] to cover pregnancy").

b. Petitioner's objection to *any* exclusion of pregnancy-related conditions—irrespective of whether the employment decision to exclude such conditions was based on neutral criteria that also exclude other conditions (Pet. Br. 28-29)—cannot be squared with Justice Stevens's dissent in *Gilbert* (which Congress endorsed in the PDA). Justice Stevens explicitly considered a plan that excluded pregnancy *and* other conditions using "neutral criteria, such as whether an absence was voluntary or involuntary, or perhaps particularly costly." 429 U.S. at 161 (Stevens, J., dissenting). Such a plan might still have been struck down, but the "appropriate" legal theory, he concluded, would have been under disparate *impact*, not disparate treatment. *Ibid.*

Petitioner's reading of the PDA and her bold assertion that UPS could be held liable on her disparate-treatment claim "without any inquiry into subjective intent" (Pet. Br. 17) ignores Justice Stevens's distinction, and "conflat[es] the analytical framework for disparate-impact and disparate-treatment claims." *Raytheon*, 540 U.S. at 51.

In several cases, this Court has explained that "disparate treatment is the most easily understood

type of discrimination. The employer simply treats some people less favorably than others *because of* their race, color, religion, sex, or other protected characterization." *Id.* at 52 (alterations and internal quotation marks removed) (emphasis added); *see also Hazen*, 507 U.S. at 609; *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In other words, "[l]iability in a disparate-treatment case depends on whether the protected trait *actually motivated* the employer's decision." *Raytheon*, 540 U.S. at 52 (alterations and internal quotation marks omitted) (emphasis added); *Ricci*, 557 U.S. at 577 ("A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action") (internal quotation marks omitted).

Critically, this Court has held that the routine application of a "neutral, generally applicable" policy, like UPS's previous policy, "can, in no way, be said to have been motivated by" a protected classification and therefore cannot constitute disparate *treatment*. *Raytheon*, 540 U.S. at 55. Indeed, the Postal Service has—and the Justice Department defended—the same policy, and it can hardly have been intentional discrimination for UPS to follow suit. At a minimum, UPS is not subject to punitive damages liability. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 548 (1999) (Stevens, J., concurring).

"By contrast, disparate-*impact* claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon*, 540 U.S. at 52 (internal quotation marks omitted) (emphasis added). Unlike under a disparate-

treatment theory, under "a disparate-impact theory of discrimination, a facially neutral employment practice may be deemed illegally discriminatory without evidence of the employer's subjective intent to discriminate." *Id.* at 52-53 (alterations and internal quotation marks omitted).

This Court could ignore UPS's intent only if petitioner were pursuing a disparate-impact claim (which she is not). To accept petitioner's theory would require this Court to fuse together the disparate-impact and disparate-treatment theories of discrimination—in contravention of traditional Title VII analysis and its guidance that "courts must be careful to distinguish between these two theories." *Raytheon*, 540 U.S. at 53.[7]

3. The text of the PDA also directly forecloses petitioner's position for at least three reasons.

First, petitioner's interpretation violates the "cardinal rule" that a "statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Indeed, it is petitioner—not UPS—that ignores a clause. Petitioner *starts* with the second clause (Pet. Br. 20), and then reads that clause in isolation as creating a "distinct and independent" remedy (*id.* at 26). That is not the statute enacted by Congress.

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[7] In *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991), the Court indicated that, although distinctions based on "childbearing capacity" violated Title VII, a distinction based on "fertility alone" would not, as the former classification affected women only but the latter classification affected women and men alike. *Id.* at 197-98. UPS likewise drew distinctions that affected women and men alike.

Congress crafted the PDA as a single sentence comprised of two halves separated by a semicolon. That semicolon does not permit this Court to divorce the first half from the second; both halves must be considered *together*. Because the second clause "cannot be interpreted apart from context," its meaning "become[s] clear when [it] is analyzed in light of the terms that surround it." *Smith* v. *United States*, 508 U.S. 223, 229 (1993). So analyzed, the two halves merely define and clarify that the PDA prohibits discrimination "*because of* pregnancy." Again, UPS engaged in no such discrimination.

Second, petitioner's interpretation misinterprets the key phrase that pregnant workers "shall be treated the same as other persons." In essence, petitioner asks this Court to read into the statute the words "any other person" where the words "other persons" are. But the statute does not prescribe treating pregnant employees the same as "*any* other person" of similar work ability or even any *particular* "group" (Pet. Br. 29) or "se[t]" (*id.* at 20) or "subset" (*id.* at 28) or "clas[s]" (*id.* at 31) of other persons. Rather, it mandates that employers treat pregnant women like unspecified "other persons," *i.e.*, "different" employees or "additional" employees. *Webster's Third International Dictionary* 1598 (1978) (defining "other"). In other words, the amendment states that employers cannot categorically exempt pregnant employees from policies that apply to "other" employees similar in their ability or inability to work.

Even though the same lifting restriction could result from an on-the-job *or* an off-the-job injury, petitioner argues that the PDA requires UPS to treat her the same as employees in the former group rather than the latter group. Yet she provides no

basis (let alone a principled one) for why she should be treated the same as one group, but not the other. She expressly disavows, for example, that, with respect to her ability to work, she is *more* similar to those injured on the job than those injured off the job. Pet. Br. 17 ("The statute does not ask whether a pregnant worker is similar to other employees in the *source* of her workplace limitation"). The only way to avoid this arbitrary selection among various groups of employees is to read the statute as precluding employers from treating pregnant women less favorably by placing them in a class of their own. But UPS did not single out pregnant women in this manner.

Third, petitioner's reading of the PDA would *mandate* the accommodation of pregnant workers. Petitioner, to be sure, tries to sidestep this problem on the ground that "an employer is free to accommodate *none* of its workers." Pet. Br. 29. That is nonsense. The ADA affirmatively requires UPS to provide reasonable accommodations to disabled persons. *See* 42 U.S.C. § 12101 *et seq*. And once UPS provides accommodations to persons with ADA-qualifying disabilities—as it must, by law—petitioner admits that her reading of the PDA would require UPS to provide those same accommodations to non-disabled women with pregnancy-related lifting restrictions too. *See* Pet. Br. 32.

The government, for good reason, tries to distance itself from this bizarre position. *See* U.S. Br. 20-21. It would be contrary to the congressional design to conclude that the PDA, adopted 14 years previously, automatically requires employers to

grant pregnant women any accommodation that might be provided in accordance with the ADA.[8]

B. History

The history of the PDA amendment confirms that the plain reading of the text is correct. The PDA "simply add[ed] a new subsection to Title VII's definitions" and, in so doing, merely clarified that Title VII principles of equal treatment apply to pregnant women. 123 Cong. Rec. 7,671 (1977) (Statement of Sen. Williams).

1. The PDA was corrective legislation that "merely reestablish[ed] the law as it [had been] understood prior to *Gilbert*." S. Rep. No. 95-331, at 8. Both the House and the Senate Reports emphasized that the PDA "reflect[ed] no new legislative mandate" "nor effect[ed] changes in practice" "beyond those intended by Title VII." H.R. Rep. No. 95-948, at 3; *see* S. Rep. No. 95-331, at 3-4 (the Bill "defines

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[8] UPS individually crafts every ADA accommodation (*see* J.A. 548-49), and nothing in the PDA requires employers to replicate that process for pregnant employees. Moreover, petitioner does not point to any evidence that UPS has granted light-duty assignments as an ADA accommodation to any employee with a lifting restriction. Petitioner's alternative suggestion that she should be compared to those who lost their DOT cards fares no better: Those employees are entitled to "inside" jobs under the CBA, but that is not light-duty work. Employees in this category must continue to lift packages up to 70 pounds and thus petitioner and the government err in suggesting that they make proper comparators. Petitioner's only comprehensible claim is that she should have been treated like an employee with a lifting restriction resulting from an on-the-job injury; but that argument fails as a matter of both law and fact. *See* Parts II.A.1.c. & III.2.a.

sex discrimination to include th[e] physiological occurrences peculiar to women; it does not change the application of title VII to sex discrimination in any other way"). Legislative supporters also confirmed that the PDA was "simply corrective legislation" (123 Cong. Rec. 29,387 (1977) (Statement of Sen. Javits)), that did "not really add anything to title VII" (*id.* at 10,581 (Statement of Rep. Hawkins)). *See Newport News*, 462 U.S. at 679 n.17 (collecting sources).

In responding to *Gilbert*, Congress endorsed the views of the dissenting Justices—but went no further. Indeed, the Senate Report stated that the dissenting Justices in *Gilbert* had "correctly express[ed] both the principle and the meaning of title VII." S. Rep. No. 95-331, at 2. The House Report agreed that "the dissenting Justices correctly interpreted the Act." H.R. Rep. No. 95-948, at 2. Numerous legislators endorsed the dissenters' views in expressing their own support for the bill. *See Newport News*, 462 U.S. at 679 n.17 (collecting citations). As explained above, petitioner's view contravenes those dissents. *See* Part I.A.2.b, *supra*.

2. Petitioner cites a handful of congressional statements that purportedly support her interpretation. *See* Pet. Br. 18, 21, 25 n.4, 36-37 n.12. These snippets, however, when placed in proper context, do not support petitioner's position, nor do they detract from the rest of the legislative record, which is inconsistent with petitioner's view.

Petitioner cites, for example, a portion of the Senate Report stating that the PDA would "'prevent employers from treating pregnancy and childbirth differently from other causes of disability.'" Pet. Br. 18 (quoting S. Rep. No. 95-331, at 4). But the previ-

ous sentence of that report makes clear that the different treatment referred to was the kind of exclusion that occurred in *Gilbert*, *i.e.*, an exclusion that disadvantaged pregnancy alone. *See* S. Rep. No. 95-331, at 4 ("The *Gilbert* case itself dealt with the exclusion of disability arising from pregnancy").

Petitioner also relies on a single quote from the House Report, requiring that light-duty work assignments be "'administered equally for all workers in terms of their actual ability to perform work.'" Pet. Br. 21 (quoting H.R. Rep. No. 95-948, at 5). But this statement does no more than restate the basic charge of the PDA, which requires employers to treat similarly situated employees the same, regardless of pregnancy.

Finally, petitioner and her *amici* try to justify their expansive interpretation by claiming that a new cause of action was needed to address a number of barriers women faced in the workplace. *See*, *e.g.*, Pet. Br. 28, 30, 34, 41 (perception that pregnant women are marginal workers); *id.* at 19 (mandatory leave for or automatic firing of pregnant women); *id.* at 18-19 (discrimination based on antiquated stereotypes about women). But it is clear that Congress believed that Title VII itself addressed those concerns already, and that the PDA was needed only to clarify that Title VII covered pregnancy discrimination. *See*, *e.g.*, S. Rep. No. 95-331, at 3 (describing "the central purpose" of Title VII's prohibition on sex discrimination as addressing "the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace").

Indeed, Congress repeatedly emphasized that the PDA "reflect[ed] no new legislative mandate" and instead restored Title VII's "mandat[e]" of "equal

access to employment and its concomitant benefits for female and male workers." H.R. Rep. No. 95-948, at 3; 124 Cong. Rec. 21,435 (1978) (Statement of Rep. Hawkins); *see* 123 Cong. Rec. 29,387 (1977) (Statement of Sen. Javits) ("This legislation does not represent a new initiative in employment discrimination law").

3. The legislative history is replete with statements clarifying that employers who provide benefits for employees who have suffered on-the-job injuries are not obligated to provide the same benefits to pregnant employees. Representative Sarasin, for example, noted that the PDA "would not require extending coverage beyond job-related disability if that is all the existing coverage provides." 124 Cong. Rec. 21,436 (1978). Senator Culver agreed that the legislation required only that employers "treat pregnancy-related disabilities the same as any other nonwork related disability with regard to benefits and leave policies." 123 Cong. Rec. 29,663 (1977); *see also id.* at 29,660 (Statement of Sen. Biden) ("disability due to pregnancy must be treated the same as any other non-work-related disability"); *id.* at 7,541 (Statement of Sen. Brooke) (the PDA "will simply mean that employers who do provide a disability plan must treat disability due to pregnancy or any related medical condition the same as all other nonwork-related disability"); *id.* at 8,146 (the PDA will require employers "to treat disability due to pregnancy the same as any other nonwork-related disability"). These statements make clear that an employer could, consistently with the PDA, treat pregnant employees the same as those with

similar physical restrictions resulting from off-the-job injuries or conditions (*i.e.*, a "nonwork related disability").[9]

The legislative history also makes clear that employers can require that pregnant employees receive benefits on the same neutral terms and conditions as other employees. For instance, the Senate Report mentions that employers could "conditio[n] disability benefits upon an intent to return to the job upon recovery." S. Rep. No. 95-331, at 5. The House Report adds that an employer could require a physician's certification, or a physical examination, as a pre-condition to receiving benefits. H.R. Rep. No. 95-948, at 6. These neutral eligibility requirements are no different than UPS's requirement that only employees who are injured on the job are entitled to a temporary work accommodation.

C. Structure

"Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Cen.* v. *Nassar*, 133 S. Ct. 2517, 2529 (2013). By locating the PDA in Title VII itself, Congress confirmed that the amendment simply clarifies that Title VII's protections apply to preg-

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[9] Petitioner's suggestion that UPS "misreads" these statements (Pet. Br. 35) is insupportable. There would have been no reason for these legislators to specifically use the phrase "nonwork related disability" if they were not endorsing a distinction between on-the-job and off-the-job disabilities. And, indeed, the context in which they made these statements—while "dispel[ling]" "myths" about the bill—makes it clear that they were endorsing this precise distinction. *See, e.g.*, 123 Cong. Rec. 29,660 (1977).

nancy. Petitioner's contrary position would radically transform a discrimination statute into an accommodations statute.

1. Congress deliberately confirmed its choice to clarify that traditional anti-discrimination protections apply to pregnant employees by placing the PDA in the "Definitions" section of Title VII, 42 U.S.C. § 2000e, and titling it an act "[t]o amend Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy." As this Court has recognized, "a definitional section" merely "elucidates the meaning of certain statutory terms"—*i.e.*, "because of" or "on the basis of" sex—but "proscribes no conduct." *Carr* v. *United States*, 130 S. Ct. 2229, 2237 n.6 (2010). The title of the PDA, too, confirms that the amendment simply accords pregnant women the same protections against sex discrimination as non-pregnant women.

Petitioner concedes that the PDA is a definitional amendment (Pet. Br. 26), but contends that is not dispositive because so, too, is the religious discrimination provision of Title VII, 42 U.S.C. § 2000e(j), which requires employers to affirmatively accommodate religious beliefs (Pet. Br. 26 n.5 & 27). Yet that very provision points up the error in petitioner's analogy, since unlike the PDA it expressly contemplates an employer's "reasonabl[e] accommodation" of religion. 42 U.S.C. § 2000e(j). That no such language appears in the PDA "reinforc[es] the conclusion that Congress acted deliberately when it omitted" a requirement to provide accommodations to pregnant women. *Nassar*, 133 S. Ct. at 2529. "If Congress had desired" to require some accommodation of pregnant women, "it could have used lan-

guage similar to that which it invoked in § [2000e(j)]." *Ibid.*

If the PDA required employers to provide accommodations to pregnant employees, Congress would have included such an affirmative mandate in the statute as it did with respect to religion. The absence of any such requirement respecting pregnancy is an important structural indicator that petitioner is wrong. Indeed, petitioner can point to no other federal statute that requires accommodations without expressly so stating.

Even the religious accommodation provision has not been interpreted as broadly as petitioner asks this Court to construe the PDA. In *Hardison*, the Court explained that, despite the "reasonable accommodation" language in section 2000e(j), that provision did *not* require an employer to accommodate the religious preferences of one of its employees. *Hardison*, 432 U.S. at 81. Even though there was *specific language* in the provision requiring "reasonable accommodation," the Court held that "Title VII does not require an employer to go that far." *Ibid.* Here, there is no such language; *a fortiori*, the PDA does not require an employer like UPS to "go that far" and accommodate pregnant employees by making light-duty work available to them.

2. If accepted, petitioner's reading of the PDA would work a wholesale expansion of discrimination law—in conflict with basic principles of Title VII, employment law, and the ADA. That Congress did not silently enact that sweeping reform is clear: Congress does not "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

a. Petitioner asks this Court to declare unlawful a fundamental distinction in employment law between on-the-job and off-the-job conditions. But the entire purpose of anti-discrimination law is to eliminate only those distinctions that "rely on stereotypical assumptions" about a protected trait. *Ky. Ret. Sys.* v. *EEOC*, 554 U.S. 135, 146 (2008). As this Court has explained, a disparity that "is simply an artifact of [policy] rules that treat one set of workers more generously" than another—but is not "actually motivated" by bias against a protected group—is never disparate treatment. *Ibid.* This is true even where there is a strong correlation between the protected classification and the neutral criteria used to grant or deny the benefit—as this Court has long recognized. *See id.* at 148 (pension eligibility plan which depended on years of service and typically went hand-in-hand with age did not discriminate "because of" age); *Hazen*, 507 U.S. at 611 (a decision to fire someone to stop his pension plan from vesting was not a form of discrimination "because of" age); *see also Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 277-78 (1979) (veteran preference statute was not a form of discrimination "because of gender" even though 98% of veterans were men). As this Court has noted, "because of" language must be interpreted consistently across all federal antidiscrimination statutes. *Nassar*, 133 S. Ct. at 2534.

The distinction between on- and off-the-job injuries represents a long-standing neutral criterion that has been the centerpiece of workers' compensation law since the early 20th century. *See, e.g., N.Y. Cent. R.R. Co.* v. *White*, 243 U.S. 188, 196, 209 (1917) (upholding the constitutionality of New York's workers' compensation law). Indeed, Congress has long endorsed this distinction under the Federal Employ-

ee Compensation Act of 1916, 5 U.S.C. §§ 8101-8193, which provides compensation for lost wages and medical expenses for federal employees who suffer job-related injuries.

If petitioner's reading were accepted, employers would be prohibited from using a host of well-established neutral criteria for making available accommodations and other employee benefits. Such criteria include seniority status, union status, full-time status, executive status, and veteran status, among many others. These distinctions are enshrined in—and, in some cases required by—a wide variety of state and federal labor and employment laws. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; Labor Management Relations Act, 29 U.S.C. §§ 401-531; Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335.

Employment policies that track such "Congressionally-mandated distinction[s] d[o] not violate the Pregnancy Discrimination Act." Govt. Br., *Guarino*, 2004 WL 3020921, at *7. To hold otherwise would threaten to undermine employers' ability to rely on these distinctions at all.

b. Petitioner's reading would have implications that reach far beyond this case. The PDA requires that pregnant employees "be treated the same for *all employment-related purposes*" 42 U.S.C. § 2000e(k) (emphasis added). This particular case concerns assignment accommodations, but petitioner's reading necessarily extends across the gamut of employment benefits—including leave policies, office or parking space, technology, and transportation, among many others.

Under petitioner's construction, a pregnant employee would be entitled to receive the same benefits as any other employee—including just *one* employee—"similar in [his or her] ability or inability to work." If the CEO receives company-provided transportation as an accommodation for a back injury, then so too must the pregnant mailroom clerk, merely because they have the same physical capability to work. If an employer has a policy of granting paid leave for temporary disabilities to only full-time management employees who have been employed for at least 15 years, under petitioner's reading, the employer also must provide this paid leave to every pregnant employee, including brand-new, part-time hourly employees.

Under petitioner's approach, pregnant employees could choose their own comparators and select from a smorgasbord of options provided to any non-pregnant employees, regardless of circumstances (*e.g.*, light-duty work, additional leave, technological or ergonomic adjustments to the workplace). That would be absurd.

c. Petitioner's understanding of the PDA also cannot be squared with the ADA because it would require *greater* accommodation of pregnant employees under the PDA than that provided in the ADA, which is an actual accommodations statute.

The ADA requires employers to provide reasonable accommodations for disabled workers. But, at the time of petitioner's complaint, even the ADA did not include temporary impairments like lifting restrictions within its definition of "disability." *Williams* v. *Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 (4th Cir. 1996); *Aucutt* v. *Six Flags Over Mid-Am., Inc.*, 85 F.3d 1311, 1319 (8th Cir.

1996). Petitioner indisputably was not entitled to an ADA accommodation—she brought that claim, and lost.[10] In essence, then, petitioner contends that she is entitled to an accommodation under an *antidiscrimination* statute that she was not entitled to under an accommodations statute. That makes no sense.

Petitioner's effort to transform the PDA into an accommodations statute also ignores many statutory safeguards designed to balance the interests of employers and employees alike. Accommodations statutes generally require only reasonable accommodations, and then only where a specific accommodation would not impose an "undue hardship" upon the employer or pose safety risks to others. *See, e.g.*, 42 U.S.C. § 12112; *id.* § 2000e(j). Additionally, federal accommodations law allows the employer to choose among effective, reasonable accommodations. *See, e.g.*, 29 C.F.R. pt. 1630 app. § 1630.9.

Nevertheless, petitioner's view of the PDA would require an employer to provide an accommodation to a pregnant employee whenever and however it provided an accommodation to any other employee, even if doing so would, in the specific circumstances, be unreasonable or unduly burdensome or unsafe.

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[10] Employers *now* may be required in certain cases to accommodate a pregnant employee's request for light-duty work or similar arrangements under the ADAAA. *See* Part I.B.1, *supra*. But that statute's application is not at issue here. And it would be anomalous to assume that the ADAAA—which is not retroactive—somehow confirms that an earlier, unrelated statute required the same accommodations. *Cf. Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998) (later-enacted laws "do not declare the meaning of earlier law").

That result would lay waste to the carefully calibrated interactive process between employers and employees that is the bedrock of federal accommodations law under the ADA. *See* 29 C.F.R. § 1630.2(o)(3).

Petitioner's preferred remedy—work reassignment—is also a remedy contemplated not by discrimination law, but by accommodations law. Title VII is primarily backward-looking, purposely designed to "mak[e] persons whole for injuries suffered through *past* discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975) (emphasis added). The ADA, in contrast, is forward-looking, compelling employers to affirmatively "accommodate [a person's] disability" on an ongoing basis. *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 688 (2001).

In short, petitioner asks this Court to transform an *antidiscrimination* statute into an *accommodations* statute, the likes of which Congress has *never* enacted. But the ADA only "reinforces the conclusion that Congress acted deliberately when it omitted" accommodation claims from the PDA. *Nassar*, 133 S. Ct. at 2529; *Arabian Am. Oil Co.*, 499 U.S. at 256 (congressional amendment of Age Discrimination in Employment Act (ADEA) on a similar subject coupled with congressional failure to amend Title VII weighs against conclusion that the ADEA's standard applies to Title VII). Petitioner thus presents a prospective, aspirational vision of what pregnancy protections might be desirable, but not what the PDA requires.

3. Petitioner's construction of the PDA would also compel the absurd result that pregnancy alone—of all protected traits—would enjoy a super-protected

status. This, too, is evidence of its wrongness. *See United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

Petitioner's interpretation of the PDA would require this Court to treat pregnancy more favorably than *any* other trait protected by federal law solely on the ground that the second clause of the amendment states that employers must treat pregnant employees the same as unspecified others. As this Court has held, it is not discrimination to deny an accommodation through an evenhanded application of a neutral policy. *See, e.g.*, *Hardison*, 432 U.S. at 79-80 (employer does not engage in religious discrimination when it denies an employee's accommodation request in accord with a neutral policy); *Raytheon*, 540 U.S. at 54-55 (employer does not engage in disability discrimination when it refuses to rehire a disabled person in accord with a neutral policy); *cf. Feeney*, 442 U.S. at 277-78 (statute did not violate equal protection by providing preferences for veterans even though 98% of veterans were men). But, in petitioner's view, it *would* be discrimination to deny a pregnant woman such an accommodation.

This case is a striking example of what petitioner's reading would require of employers. Petitioner claims to have sought equal treatment, but, given the nature of UPS's previous accommodations policy, she obviously sought more. After all, UPS's policy did not contemplate the provision of light-duty work to *any* employee for nine months. Rather, those injured on the job were provided TAW, intended to rebuild strength, for *one month*. Those with a permanent disability received an accommodation that may or may not have been "light duty" depending on the nature of their disability and hardship to UPS. And those who lost their DOT certification did not

receive a light-duty assignment at all; rather—unlike petitioner—they could not drive, but they still could lift, and were required to do so. UPS is, after all, in the business of delivering packages.

Petitioner thus sought an accommodation that *no* employee was entitled to; she asked for preferential—not equal—treatment. Tellingly, petitioner does not point to *any* employee who received the same accommodation she sought. *See Burdine*, 450 U.S. at 258 ("it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally").

Petitioner's request for special treatment cannot be reconciled with this Court's interpretation of the PDA in *AT&T Corp.* v. *Hulteen*—a case in which the Court explained that the PDA does *not* bestow most favored nation status on pregnant women. There, a pregnant employee challenged her employer's pension plan, which gave less retirement credit for pregnancy than for medical leave. The employer argued that its pension plan came within the exemption for bona fide seniority systems. 556 U.S. 701, 707-08 (2009). Although the plaintiff pointed to the PDA's second clause to explain why the exemption should not apply, this Court rejected that argument, reasoning that the plaintiff's reading of the PDA "would result in the odd scenario that pregnancy discrimination, alone among all categories of discrimination (race, color, religion, other sex-based claims, and national origin), would receive dispensation from the general application of [this exemption]." *Id.* at 709 n.3.

In sum, the PDA clarifies that disparate treatment of pregnant workers is sex discrimination. It does not require employers to provide a special accommodation to a woman who has a pregnancy-

related lifting restriction when that employee is otherwise ineligible for an accommodation under a neutral accommodations policy. Adherence to the text, history, and structure of the statute requires affirmance of the decision below.

III. PETITIONER FAILED TO RAISE A GENUINE ISSUE OF MATERIAL FACT WITH RESPECT TO HER DISPARATE-TREATMENT CLAIM

Applying well-established Title VII principles, the court of appeals correctly affirmed the district court's conclusion that petitioner had failed to raise a genuine issue of material fact with respect to her disparate-treatment claim. Both courts below correctly recognized that the application of UPS's previous "pregnancy-blind" policy did not constitute disparate treatment on the basis of pregnancy and so could not serve as "direct evidence" of discrimination. *See* Pet. App. 9a, 18a. And they correctly rejected petitioner's so-called "indirect evidence"—the policy (again) and statements by persons with no decision-making authority—as insufficient to raise a genuine issue of material fact. *See id.* at 25a. Petitioner's attempt to reargue these case-specific rulings should be rejected.

1. Because petitioner proceeds only under a disparate-treatment theory of discrimination, she must prove that she suffered *intentional* discrimination at UPS's hands. *Burdine*, 450 U.S. at 253. Intentional discrimination may be proved by either direct or indirect evidence of discriminatory animus. *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 714 (1983).

Petitioner invents an altogether new method of proving disparate-treatment "discrimination" by

pointing to UPS's neutral former policy as "direct evidence" of discrimination. But "direct evidence" is evidence that, "if true, proves a fact"—here, discrimination *because of* pregnancy—"without inference or presumption." *Black's Law Dictionary* 636 (9th ed. 2009).[11]

Here, UPS took no employment action against petitioner "because of" her pregnancy. Rather, UPS treated petitioner exactly the same as other employees—those with off-the-job injuries or conditions. *See, e.g.*, J.A. 576, 693-94. And, consistent with that policy, UPS denied petitioner an accommodation and required her to take leave not because she was pregnant, but because she did not meet any of the neutral criteria that would have rendered her eligible for an accommodation or to continue working (*i.e.*, on-the-job injury, ADA disability, loss of a DOT card, or no physical restrictions). Because petitioner has no direct evidence of pregnancy discrimination, her disparate-treatment claim must be evaluated under the indirect *McDonnell Douglas* burden-shifting framework.

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[11] Petitioner badly misreads *Johnson Controls*, 499 U.S. at 199, and *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 122 (1985), for the proposition that UPS's policy is direct evidence of discrimination. *See* Pet. Br. 34, 40, 47. Both cases concerned facially discriminatory policies and are therefore inapposite. *See Johnson Controls*, 499 U.S. at 199 (facially discriminatory policy that explicitly excluded fertile female employees from certain jobs); *Thurston*, 469 U.S. at 120-21 (facially discriminatory policy that excluded employees of at least 60 years of age from automatic eligibility to transfer to a different position).

2. Petitioner failed to make out a disparate-treatment claim under the *McDonnell Douglas* framework. Under that framework, petitioner "has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53. If and only if she succeeds, the burden shifts to UPS "to articulate some legitimate, nondiscriminatory reason" for its actions in denying her the accommodation. *Id.* at 253 (internal quotation marks omitted). The burden then shifts back to petitioner to show that the articulated reason was merely a pretext for intentional discrimination. *Ibid.* The evidence in this record precludes a finding for petitioner at every step.

a. Petitioner tries to circumvent the requirement to make a prima facie case of discrimination, under which she "must prove by a preponderance of the evidence" that UPS's decision to deny her an accommodation took place "under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, 450 U.S. at 253. Some courts, including the court below, have held that a plaintiff can make out a prima facie case of pregnancy discrimination by reference to four elements, including whether similarly situated employees outside the protected class received more favorable treatment than the plaintiff. Pet. App. 26a-27a. Petitioner argues that she was similarly situated to those who received accommodations under UPS's neutral policy. Pet. Br. 48-49. But petitioner can "no more successfully" indirectly attack UPS's policy "than she could directly" (Pet. App. 27a) for at least two reasons.

First, petitioner is not similarly situated to those who were eligible to receive light-duty assignments. Petitioner contends that she need only be similar in

her ability to work—but not similar in any other respect—as her identified comparators. But "the expansion of the concept of 'comparators' to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII." Barker Memo at 2. As this Court has recognized, a prima facie case requires "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *O'Connor* v. *Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (alterations, internal quotation marks, and some emphasis omitted). In other words, "there must be at least a logical connection between each element of the prima facie case and the illegal discrimination." *Ibid.* (holding that certain comparator evidence was "not a proper element of the *McDonnell Douglas* prima facie case" because it "lack[ed] probative value").

As explained above, however, there is no "logical connection" between UPS's application of the pregnancy-blind policy and petitioner's alleged discrimination because that policy drew no distinctions "because of" or "on the basis of" pregnancy. *See* Part III.1, *supra*. Comparing petitioner to those who were entitled to an accommodation, therefore, would not create any inference that UPS's decision to deny her an accommodation was "based on an illegal discriminatory criterion" such as her pregnancy. *O'Connor*, 517 U.S. at 312 (alterations, internal quotation marks, and emphasis omitted). It would only reveal that UPS provided accommodations to some persons, but not others.

Relatedly, petitioner fails to explain to whom she contends she was similarly situated in other re-

spects. In any population of workers, there will be many who cannot lift 70 pounds and are therefore similar to petitioner with respect to this particular job requirement. Such lifting restrictions might stem from a variety of sources: some will not be able to lift 70 pounds because they are too small or frail; others because of some non-disabling medical condition like arthritis; others because of a gardening or sports injury; others because of a sprain sustained on the job; and still others because of a medical condition like cerebral palsy that rises to the level of an ADA-cognizable disability. Petitioner provides no reason why she should be compared to the one with cerebral palsy or the one who sustained a sprain on the job, rather than any of the others. Instead she simply insists—with no support whatsoever—that the "*source*" of the limitation is irrelevant. Pet. Br. 17.

UPS, on the other hand, has provided the reason why petitioner should be compared to the arthritis sufferer and the overzealous gardener, rather than the one with the ADA-cognizable disability or the one injured on the job. UPS was required by law to accommodate those with ADA-cognizable disabilities and it accommodated those injured on the job for the sake of workforce continuity and to assist them in returning to their regular jobs as quickly as possible. J.A. 254, 569. Because these short-term temporary assignments rarely lasted longer than 30 days, UPS could make work available to those injured on the job without disrupting the seniority system. Petitioner, on the other hand, needed an assignment that would last for up to nine months, and was not able to lift for reasons entirely exogenous to her work. UPS, therefore, was lawfully permitted to choose not to provide an accommodation.

At bottom, petitioner asks for much more than equality. She insists that she is entitled to her pick of accommodations and benefits. But UPS, as the employer, is entitled to decide how to structure its operations, so long as it does so lawfully. There is no doubt that it acted within the bounds of the law here.

Second, even if this Court were to find that the similarly situated analysis is concerned only with physical ability to work, petitioner was *not* similarly situated in her ability to work as those workers who were eligible for accommodations.

Petitioner was not similar in her ability to work as an employee with an occupational injury who received TAW under the CBA. Those with occupational injuries were capable of doing "work hardening" assignments to build up their muscles such that they could return to their regular job in a month. J.A. 254, 569. Petitioner was not similarly situated to such employees because her doctor forbade her from lifting more than 20 pounds for *nine* months. *Id.* at 580.

Petitioner was also dissimilar in work ability to an employee with an ADA-cognizable disability because petitioner's lifting restriction was only temporary and not otherwise "a significant restriction on her ability to perform major life activities." Pet. App. 27a; *see* U.S. Br. 20-21. The undisputed fact that petitioner did not have an ADA-qualifying disability (under pre-ADAAA law) conclusively establishes that she was not similarly situated to those who were disabled under the ADA.

Petitioner was also dissimilar to an employee who lost his or her DOT certification. To receive an "inside job," those who lost their DOT certification

still needed to be able to engage in heavy lifting. Pet. App. 27a. Petitioner, however, had a lifting restriction that prevented her from engaging in heavy lifting and thus from performing many "inside" job tasks. Moreover, unlike those who lost their DOT certification, petitioner could still perform the driving part of her job. Petitioner and those who lost their DOT certification were, therefore, not "similar in their ability to work."

b. In any event, even if petitioner could make out a prima facie case, the application of UPS's pregnancy-neutral policy was a non-discriminatory reason for its actions that renders the prima facie case obsolete. Petitioner asserts that "the PDA's plain terms are inconsistent with" finding the policy nondiscriminatory. Pet. Br. 49. But, again, the text does not obliterate an employer's right to rely on neutral policies: the PDA was enacted to overturn *Gilbert*, not *McDonnell Douglas*. The burden, therefore, shifts back to petitioner to proffer evidence of pretext. *See Burdine*, 450 U.S. at 254-56.

Petitioner did not challenge in her petition for a writ of certiorari the district court's determination, undisturbed by the Fourth Circuit, that UPS's reasons for denying the requested accommodation were not pretextual. She therefore forfeited this issue, which is in any event fact-bound and beyond this Court's ordinary purview. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("both courts below having agreed on the facts, we are not inclined to examine the record for ourselves absent some extraordinary reason for undertaking this task").

Regardless, petitioner's last-gasp contention that the district court erred in this respect (Pet. Br. 49-50) is based on misrepresenting two isolated comments

by individuals who had no involvement either in the creation of the policy in the CBA or the specific decision to deny petitioner light duty.

Petitioner first implies that a shop steward stated that UPS provides accommodations to everyone but pregnant employees. Pet. Br. 49. But even aside from the fact that this individual is not a manager with authority to bind UPS, her comment was wrenched out of context. The shop steward simply stated that she did not *personally* know of persons (other than pregnant persons) who were not accommodated (*see* J.A. 503-04), but *admitted* that she knew of (1) pregnant supervisors who were accommodated because they were non-bargaining unit employees (*see id.* at 478-79, 485, 503-04) and (2) others who were permitted to work throughout their pregnancy (*see id.* at 479).

Petitioner next relies on a stray comment allegedly made by a UPS manager to the effect that petitioner was a "liability." Pet. Br. 50. But the district court found that manager neither had decision-making authority over petitioner nor sought to influence someone who did. Pet. App. 53a-54a; *see* note 2, *supra*. Moreover, as the court of appeals explained, this statement "stand[s] alone as the only explicit evidence of a pregnancy-related comment, derogatory or otherwise." Pet. App. 25a. Such an isolated and stray remark—by a non-decisionmaker no less—is insufficient to raise a genuine issue of material fact as to pretext. *See, e.g.*, *Autry* v. *Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 348 (5th Cir. 2013).

c. Finally, petitioner asks the Court to abandon the *McDonnell Douglas* framework (Pet. Br. 17, 47-48) for the simple reason that she cannot prevail

under that standard. Every court to consider the issue, however, has applied that framework. *See* Part I.A.1, *supra*. A PDA claim is nothing other than a specific type of Title VII claim; it must be analyzed the same way as any other Title VII claim. The government agrees on this point. *See* U.S. Br. 12-14, 17-18.

Petitioner's insistence that UPS's intent was irrelevant cannot be squared with Title VII as it has consistently been applied by this Court. Indeed, petitioner radically seeks to transform an antidiscrimination statute under which money may be awarded only upon proof of intentional wrongdoing into a strict-liability accommodations statute without any of the procedural protections Congress historically has provided when mandating accommodations. Because UPS's decision under a neutral policy to deny petitioner special treatment was not intentional discrimination, the courts below correctly granted and affirmed summary judgment against petitioner.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CAITLIN J. HALLIGAN
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, N.Y. 10166
(212) 351-4000

MARK A. PERRY
Counsel of Record
MARISA C. MALECK
KELLAM M. CONOVER*
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

RACHEL S. BRASS
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105
(415) 393-8200

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS P.C.
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

Counsel for Respondent

**Admitted only in California; practicing under the supervision of Principals of the Firm*

October 24, 2014

APPENDIX

Date: October 24, 2014
* * *
Subj: Pregnancy Accommodations Policy

UPS takes pride in attaining and maintaining best practices in the area of equal opportunity and employment, and has elected to change our approach to pregnancy accommodations. Effective January 1, 2015, UPS's new policy will make temporary light duty work available to more of our pregnant employees with lifting or other physical restrictions. The policy reflects pregnancy-specific laws recently enacted in a number of states where UPS conducts business, and is consistent with guidance on pregnancy-related accommodations newly issued by the Equal Employment Opportunity Commission. Although these state laws vary, they generally require employers to provide leave or other accommodations to pregnant workers with medically verifiable physical restrictions resulting from pregnancy.

With respect to pregnancy-related conditions, UPS's longstanding policy has been: "A light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." Consistent with our commitment to fair and equal employment opportunities, the new policy stated below will provide temporary light duty work when available to pregnant employees to the same extent as accommodations are made to workers injured on the job. The new policy will serve to strengthen UPS's commitments to treating all workers fairly and supporting women in the workplace.

Temporary Light Duty for Pregnant Workers

Light duty work will be provided as an accommodation to pregnant employees with lifting or other physical restrictions to the same extent as such work is available as an accommodation to employees with similar restrictions resulting from on-the-job injuries.

Please share this information with your leadership teams beginning Monday, October 27. Also on Monday, the new policy will be available for all employees on UPSers.com. Additional information for H.R. staff will be provided before the effective date: please follow the existing process until January 1, 2015.

* * *

REPLY BRIEF

No. 12-1226

In The
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF

SHARON FAST GUSTAFSON
ATTORNEY AT LAW, PLC
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sharon.fast.gustafson@gmail.com

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL LAW PROGRAM
625 S. State St.
Ann Arbor, MI 48109
(734) 647-7584
sambagen@umich.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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UPS spends the first quarter of its brief, after rearguing the lack of a circuit split, addressing such matters as: how the Postal Service treats *its* employees; the possibility that other recent statutes might provide a remedy for people like Ms. Young; and the company's eleventh-hour announcement that it will in the future accommodate pregnant drivers. UPS Br. at 12-25. As to that last point, we note that UPS insisted at the petition stage that providing such accommodations would violate its collective bargaining agreement (Br. in Opp. 4; UPS Supp. Br. 8-9) – a position it has now wisely abandoned. UPS's new policy also undermines the company's argument that pregnancy accommodations are uniquely burdensome (UPS Br. 54).[1] But these matters are a mere sideshow.

This case has always been, first and foremost, about the statutory text. The Pregnancy Discrimination Act contains two clauses. The first, which provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions," 42 U.S.C. § 2000e(k), simply prohibits employers from singling out pregnancy for disadvantageous treatment. The second clause goes further.

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[1] Seemingly anticipating defeat in this Court, UPS argues (UPS Br. 32) that "[a]t a minimum," it "is not subject to punitive damages liability." But the lower courts never reached the issue of what damages are available, and it is not included in the question on which this Court granted certiorari. It should be addressed on remand.

That clause, separated from the first by a semicolon and introduced by the word "and," provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." *Id.*

The second clause requires an employer to give the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her ability to work. UPS's contrary position treats the PDA's second clause as a nullity, despite this Court's prior refusal "to read the second clause out of the Act." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). The company's position disregards Congress's acknowledged purpose to ensure that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *Id.* at 204.

If Ms. Young's lifting restriction had stemmed from an on-the-job injury, the company would have allowed her to continue working without lifting heavy packages. See p. 21-22, *infra*. And though the company proceeds as if the on-the-job/off-the-job distinction were the only one at play here, the summary judgment record contains ample evidence that UPS would have similarly accommodated Ms. Young if her lifting restriction had stemmed from an *off-the-job injury or condition* that constituted an ADA disability or that

made her ineligible for DOT certification. See p. 22-25, *infra*. Tellingly, UPS's brief does not identify a *single non-pregnant driver* with a similar lifting restriction to Ms. Young's whom the company failed to accommodate, while we have identified many such drivers whom UPS did accommodate. And, indeed, a shop steward testified that pregnancy-related requests were the only accommodations requests that triggered resistance at the company. J.A. 504.

Because UPS failed to treat Ms. Young "the same" as it treated these three sizeable classes of drivers who were "similar in their ability or inability to work," 42 U.S.C. § 2000e(k), the company violated the PDA. The Fourth Circuit's judgment must be reversed.

I. UPS's Reading Conflicts with the Plain Statutory Text

A. UPS's Reading Treats the Second Clause as a Nullity

UPS consistently treats the PDA's second clause as if it has no independent effect. UPS states that "[a]ll that is 'plain' from the statutory text * * * is that it clarifies that traditional disparate-treatment principles apply to pregnant women," UPS Br. 27; that the second clause merely "clarifies that an employer must disregard the fact that an employee is pregnant and treat her the same way it treats other similarly situated employees," *id.*; and that "the two halves merely define and clarify that the

PDA prohibits discrimination '*because of* pregnancy,'" *id.* at 34 (emphasis in UPS Br.).

But if that is all the PDA meant, the statute would have stopped after the first clause. The first clause explicitly defines "because of sex" to include "because of or on the basis of pregnancy," 42 U.S.C. § 2000e(k). Nothing more was needed to "clarif[y] that traditional disparate-treatment principles apply to pregnant women" or that "an employer must disregard the fact that an employee is pregnant and treat her the same way it treats other similarly situated employees."

The PDA's second clause – introduced by the word "and," which itself suggests that additional protection, and not mere clarification, is coming – does more than restate the requirements of the first clause. Rather, it makes clear that in a pregnancy-based sex discrimination claim the relevant comparison is between pregnant workers and others similar in the ability to work. As we showed in our opening brief (at 20-30), the second clause prohibits an employer from treating temporary disabilities caused by pregnancy less well than it treats temporary disabilities that have other causes but the same effect on "the ability or inability to work," 42 U.S.C. § 2000e(k) – even if the employer acts pursuant to a supposedly pregnancy-neutral policy that excludes disabilities caused by pregnancy.

Indeed, *General Electric v. Gilbert*, 429 U.S. 125 (1976) – the case Congress sought to overturn in the

PDA – was itself a case in which the employer acted pursuant to a supposedly pregnancy-neutral policy that excluded disabilities caused by pregnancy. GE's disability insurance plan covered any employee "who bec[a]me totally disabled as a result of a nonoccupational sickness or accident." *Id.* at 128. Because pregnancy is neither a sickness nor an accident, that plan did not cover an employee whose disability resulted from pregnancy alone. See *id.* at 136 (noting district court's findings that pregnancy "is not a 'disease' at all, and is often a voluntarily undertaken and desired condition"). If pregnant workers, while in the company's active employ, *also* experienced a sickness or accident that made them unable to work, GE provided them disability benefits.

GE's refusal to give disability benefits to pregnant workers because they had not experienced a sickness or accident thus was just as much a "neutral, pregnancy-blind policy" (UPS Br. 12), as was UPS's refusal to accommodate Ms. Young because she had not experienced an on-the-job injury, an ADA disability, or a DOT-disqualifying condition. In both cases, the employer's "pregnancy-neutral" definition, by its terms, excluded "women disabled as a result of pregnancy," *Gilbert*, 429 U.S. at 138, but it did not exclude pregnant employees who had another source of disability.

UPS acknowledges that the second clause prohibits employers from defining eligibility for benefits or accommodations in seemingly neutral ways that exclude pregnant women. UPS notes that, without

that clause, "any employer still could claim, as General Electric had done, that it was treating pregnancy differently from all other nonoccupational conditions, not 'because of pregnancy,' but because pregnancy was 'voluntary' or 'temporary' or not a 'disease' (or all of the above)." UPS Br. 30. The company suggests, however, that the clause applies only when pregnancy is the *sole* condition an employer excludes. See *id.* at 29-30 (characterizing GE's plan as providing insurance for all disabling conditions except pregnancy).

But this argument undermines the entire foundation of UPS's position. UPS concedes that the PDA's second clause prohibits an employer from providing benefits for every nonoccupational condition except pregnancy – even when the employer (a) does so pursuant to pregnancy-neutral criteria like providing benefits only to "diseases" or "injuries"; and (b) does not exclude pregnant women *who also satisfy those pregnancy-neutral criteria* from those benefits. If that is true, then the second clause does not permit an exception for "pregnancy-neutral" rules, and UPS's entire position collapses.

Moreover, the summary judgment record contains ample evidence that the three classes of work limitations UPS accommodates, taken together, account for virtually all of the non-pregnant UPS drivers with work limitations similar to Ms. Young's. Opening Br. 30-32. Again, UPS's briefing in this Court does not identify a single non-pregnant driver with a similar restriction whom UPS refused to accommodate. Even if Ms. Young was required to prove

that pregnancy was the only condition UPS excluded from accommodation, she satisfied her summary judgment burden.

Finally, UPS misreads *Gilbert*. Although the *dissenters* in that case characterized the GE plan as one that covered every source of disability except pregnancy, see *Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting); *id.* at 161 (Stevens, J., dissenting), the majority never accepted that characterization, and the plan itself defined its eligibility based on the neutral terms of "sickness" and "accident." To be sure, this Court has noted that the PDA's congressional supporters endorsed the *legal theory* of the *Gilbert* dissents. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-679 (1978). But nothing in the statute expresses any view about the majority's characterization of the *facts* in that case.

Far from reading the statute "as a whole," (UPS Br. 33, internal quotation marks omitted), UPS's reading fails to give effect to the PDA's second clause. If Congress had intended to protect employers who acted pursuant to "pregnancy-blind" policies, it would have stopped after the first clause. Or it would have used language similar to the provision of the Equal Pay Act that explicitly protects pay distinctions "based on any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv). But Congress specifically *rejected* application of the Equal Pay Act's defenses to the PDA. See *AT&T Corp. v. Hulteen*, 556 U.S. 701, 709 n.3 (2009) (noting that Congress specifically exempted the PDA from the Bennett Amendment, which applied Equal Pay Act defenses to Title VII). By

including the second clause, and forgoing the Equal Pay Act model, the PDA forecloses UPS's reading.

B. UPS's Other Statutory Arguments Lack Merit

1. UPS argues that because the PDA appears in the "'definitional section'" of Title VII, it can "'proscribe[] no conduct.'" UPS Br. 41 (quoting *Carr v. United States*, 560 U.S. 438, 450 n.6 (2010)). But *Carr* said only that the definitional section *at issue in that case* "merely elucidate[d] the meaning of certain statutory terms and proscribe[d] no conduct." 560 U.S. at 450 n.6. The PDA is crucially different. Although the PDA amended the definitional section of Title VII, its second clause does not simply define words or phrases. Rather, it speaks in plainly prescriptive terms: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This language specifically identifies the conduct that constitutes forbidden pregnancy discrimination. UPS can point to nothing that permits the Court to disregard the PDA's plainly prescriptive phrasing.

Indeed, the year before Congress enacted the PDA, this Court read an earlier amendment to Title VII's definitional section as not merely defining terms but also proscribing conduct. Section 701(j), the subsection that immediately precedes the PDA, provides

that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977), the Court held that Section 701(j) "ma[d]e it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."[2]

UPS seeks to distinguish *Hardison*, because Section 701(j) requires reasonable accommodation while the PDA does not. UPS Br. 41-42. But UPS conflates two distinct questions. The first is whether definitional provisions can impose substantive obligations. This Court's treatment of Section 701(j) in *Hardison* – decided while the PDA was pending in Congress – shows they can. *Hardison* thus fully

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[2] UPS suggests (Br. 42) that *Hardison* read Section 701(j) as not requiring reasonable accommodation, even in the context of religion. That is incorrect. The Court found "the employer's statutory obligation to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship," to be "clear." *Hardison*, 432 U.S. at 75. The Court simply found that TWA had satisfied that obligation. See *id.* at 76.

disposes of UPS's argument that definitional sections cannot proscribe conduct.

The second question is *what* are the substantive obligations the relevant provision imposes. Section 701(j) imposes a reasonable accommodation requirement in the context of religion. The PDA does not impose an independent reasonable accommodation requirement – and we have never contended that it does. Rather, the plain terms of the PDA provide that an employer must accommodate pregnant workers *if and only if* it accommodates others "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). That is the obligation that UPS violated here.

2. UPS asserts that it did treat Ms. Young the same as at least *some* other employees who were similar in the ability to work – those with off-the-job injuries. UPS Br. 34-35. Once again, UPS's factual premise is mistaken. The summary judgment record contains ample evidence that UPS did accommodate individuals with off-the-job injuries that were ADA disabilities or DOT-disqualifying conditions. See p. 22-25, *infra*. Indeed, the record suggests that lifting restrictions arising from pregnancy may have been the only ones UPS failed to accommodate. Opening Br. 9-10, 31-32. And again, UPS's briefing in this Court does not identify a single non-pregnant driver with a similar limitation whom it failed to accommodate.

In any event, the PDA's unqualified and general phrasing – requiring pregnant employees to be treated

the same "as other persons" similar in the ability to work, rather than "as all other persons" or "only to the extent that all other persons get the same treatment" – makes clear that when an employer accommodates workers with some conditions, it must also accommodate workers whose pregnancies impose similar limitations on the ability to work. Opening Br. 28-30. UPS's reading of "as other persons," by contrast, would permit an employer to refuse to accommodate pregnant workers even if it accommodates *nearly all* non-pregnant employees with similar work limitations, so long as it can find *one* non-pregnant employee whom it failed to accommodate. That reading, once again, reduces the PDA's second clause to all but a nullity. It is hardly a plausible reading of a statute that was intended to eliminate the treatment of pregnant women as "marginal" or "second-class" workers. See Opening Br. 18-19.

3. UPS notes that Congress has recently failed to enact legislation that would require reasonable accommodation of pregnant workers. UPS Br. 15. But Congress's failure to pass a new statute in 2012 or 2013 tells us nothing about the meaning of the PDA when it was enacted in 1978. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (internal quotation marks omitted). See also *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based

on antecedent futurity, should not be taken seriously, not even in a footnote."). Subsequent legislative history "is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

Moreover, there is a crucial difference between the recent pregnancy-accommodation bills and the PDA's second clause. Those recent bills would have required employers to provide reasonable accommodations to all pregnant workers, at least absent undue hardship. *E.g.*, Pregnant Workers Fairness Act, S. 942, 113th Cong., 1st Sess. § 2. Although UPS repeatedly attempts to elide the distinction, that is emphatically *not* what we read the second clause to require. As we read that clause, it requires an employer to accommodate pregnant workers only if and to the extent that it accommodates non-pregnant workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The proposed legislation would have gone well beyond that requirement. Congress's failure to pass that legislation is especially beside the point here.[3]

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[3] UPS notes that the ADA Amendments Act will entitle at least some pregnant women to accommodations. UPS Br. 21-22. But the fact that another statute may offer protection to some pregnant women says nothing about the protections the PDA affords. And even under the ADAAA pregnancy is not an "impairment" and thus cannot be a disability. Opening Br. 28.

(Continued on following page)

4. Finally, UPS argues that any challenge to a "pregnancy-blind" rule does not fit the disparate treatment doctrine, so it must proceed, if at all, under a disparate impact theory. UPS Br. 31-33. But UPS's decision to accommodate so many conditions *except* pregnancy – conditions that have a similar effect on a driver's ability to work – was plainly intentional, as evidenced by the company's refusal to accept the Teamsters' demand to include pregnancy accommodation in the CBA. Opening Br. 9-10. See also J.A. 345-346 (UPS managers told Ms. Young that "UPS does not offer light duty for pregnancy"). That is sufficient, under the text of the PDA's second clause, to show disparate treatment.

In any event, nowhere is it written, in the United States Code or the United States Reports, that disparate treatment and disparate impact are the only two categories of Title VII claims. To the contrary, in *Hardison* this Court recognized a third category of Title VII claim – a claim that the employer failed to reasonably accommodate the plaintiff's religious observance. See *Hardison*, 432 U.S. at 75. The Court did so based on the plain text of Section 701(j), which does not cleanly fit either the disparate treatment or

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Accordingly, the ADAAA fails to reach a significant class of pregnancy cases. Similarly, that some states have adopted laws mandating pregnancy accommodation (UPS Br. 22-23) says nothing about what the PDA requires – and offers cold comfort to pregnant workers in the vast majority of states that have not adopted these laws.

the disparate impact model. The PDA's second clause, unlike Section 701(j), does not impose an independent reasonable accommodation requirement. But it does impose on employers the requirement to treat pregnant workers the same as other persons "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Under that clause, an employer who fails to provide the same treatment has violated Title VII; the employer's *reason* for doing so is irrelevant. As in *Hardison*, it is the statutory text – and not an effort to force that text into a particular doctrinal category – that should guide this Court's decision.[4]

II. Giving Full Effect to the PDA's Second Clause Will Not Have the Consequences UPS Asserts

UPS argues that the Court must disregard the PDA's second clause, because the alternative will have a host of negative consequences. Giving effect to the second clause will, in UPS's view: "mandate special treatment for pregnancy, requiring an employer to provide an accommodation to a pregnant employee if the same accommodation has ever been

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[4] UPS states that, in his *Gilbert* dissent, Justice Stevens suggested that a case like this should be brought under a disparate impact theory. UPS Br. 31. However one reads his brief dissent, one thing is clear: Justice Stevens was not purporting to interpret the "shall be treated the same" language in the PDA – language that was not even proposed in Congress until *after* the *Gilbert* decision.

provided to any other employee for any reason" (UPS Br. 12); entitle pregnant workers "to pick and choose from any of the accommodations that an employer elects to provide to any other employee in the company, regardless of whether they are similarly situated in other respects" (*id.* at 13); prohibit employers from using "seniority status, union status, full-time status, executive status, and veteran status, among many others," to allocate accommodations and benefits (*id.* at 44); and entitle pregnant workers to "choose their own comparators and select from a smorgasbord of options provided to any non-pregnant employees, regardless of circumstances" (*id.* at 45). UPS is incorrect.

The PDA requires an employer to give the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her ability to work. That is because the PDA prohibits employers from treating work disabilities caused by pregnancy any less favorably than it treats work disabilities caused by other conditions. See *Newport News Shipbuilding*, 462 U.S. at 684 ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."). But the statute does not require employers to give pregnant workers all of the benefits and privileges it extends to other employees when those benefits and privileges are granted not based on the source or type of

disability but instead based on the employee's tenure or position within the company.

The EEOC takes precisely the same position. The question, as the EEOC puts it, is whether the employer "offers benefits to pregnant workers on the same terms that it offers benefits to other workers similar in their ability or inability to work." EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues § I.C.1.b. (July 14, 2014). Thus, "an employer may treat a pregnant employee the same as other employees who are similar in their ability or inability to work with respect to other prerequisites for obtaining the benefit that do not relate to the cause of an employee's limitation." *Id.* § I.A.5.

This reading is evident from the statutory text, which is necessarily premised on the employer's decision to give some employees benefits or accommodations based on the degree of "ability or inability to work." 42 U.S.C. 2000e(k). Congress crafted this language as a direct response to *Gilbert*, in which this Court blessed an employer's rule that distinguished between pregnancy-related disabilities and other disabilities based on the source of the limitation. See S. Rep. No. 95-331, 95th Cong., 1st Sess. 4 (1977) (stating that "this bill would prevent employers from treating pregnancy and childbirth differently from other causes of disability").

When an employer gives a non-pregnant employee a benefit or accommodation for reasons related to

the employee's rank, status, or tenure within the company – or an external criterion like veteran status (Chamber Comm. Br. 16) – the PDA does not grant pregnant employees any right to the same benefit, because the employer is not discriminating based on the source of the work limitation. And of course where a distinction based on a reason like seniority is specifically "required by" federal law (cf. UPS Br. 44), the other federal law will trump. Cf. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 421-422 (2002) (Souter, J., dissenting) (stating that Section 301 of the Labor Management Relations Act, which makes collective bargaining agreements enforceable, trumps the ADA's general requirement of reasonable accommodation).[5]

UPS is therefore simply wrong to say that, under our plain-language reading, "[i]f the CEO receives company-provided transportation as an accommodation for a back injury, then so too must the pregnant mailroom clerk, merely because they have the same physical capability to work," and if "full-time management employees who have been employed for at least 15 years" receive paid leave, so too must "every pregnant employee, including brand-new, part-time

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[5] UPS argues (at 43) that the PDA cannot be read to undermine what it calls the "fundamental distinction in employment law between on-the-job and off-the-job conditions." But the PDA's text includes no exception for policies favoring on-the-job injuries, and this Court lacks power to create one. See *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80 (1998).

hourly employees." UPS Br. 45. An employer is free to adopt policies declaring that some classes of employees are entitled to accommodations that others are not. And it is free to say that it will not provide *any* employee an accommodation that is unreasonable or imposes undue hardship. What it is *not* free to do is adopt policies declaring that some conditions trigger accommodations that pregnancy does not, at least when those conditions have a similar effect on the ability to work. In enacting the PDA, Congress barred employers from treating pregnant workers as marginal or second-class employees; it did not bar employers from erecting such distinctions between management employees and other employees.

For these reasons, UPS misses the mark by asserting that giving effect to the second clause would "transform an antidiscrimination statute into an accommodations statute" or "require this Court to treat pregnancy more favorably than any other trait protected by federal law." UPS Br. 47-48 (emphasis deleted).[6] Rather, giving effect to the second clause will simply read the PDA as this Court did in *Newport News Shipbuilding*, 462 U.S. at 684, as prohibiting

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[6] UPS asserts that Young "sought an accommodation that *no* employee was entitled to." UPS Br. 49. This assertion comes too late. In the lower courts UPS argued that it was entitled to treat Ms. Young differently than workers with on-the-job injuries, *not* that a worker with an on-the-job injury would not be entitled to the accommodation she sought. In any event, the summary judgment record belies UPS's assertion. See p. 21-25, *infra*.

employers from "treat[ing] pregnancy-related conditions less favorably than other medical conditions."

III. The EEOC Has Consistently Endorsed Ms. Young's Reading of the PDA

The EEOC is the federal agency that administers and enforces Title VII. As we showed in our opening brief, the EEOC has made clear since 1979 that the PDA requires an employer "to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc." 29 C.F.R. Pt. 1604 App. ¶ 5. Since then, the Commission has consistently adhered to that reading of the statute, in a string of pronouncements culminating in its recent enforcement guidance. Opening Br. 21-22.[7]

UPS dismisses this unbroken line of EEOC statements, made in regulatory and guidance documents, as a mere "litigating position." UPS Br. 21 (internal quotation marks omitted). But it is UPS, not

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[7] UPS points (at 18) to the decision of the director of the EEOC's Office of Federal Operations (not the Commission itself) in *Webb v. Frank*, 1991 WL 1187564 (Aug. 28, 1991). But the on-the-job/off-the-job distinction was not decisive in the director's decision, as the individuals the employer accommodated there had "medical restrictions [that] were not as limiting as were appellant's." *Id.* at *2.

Ms. Young, that relies on government litigating positions. UPS points, in particular, to briefs filed by United States Attorneys' offices in three individual cases defending the Postal Service. UPS Br. 15-17. The longstanding views of the agency that administers and enforces the statute count for far more than the positions that three United States Attorneys' offices took in defending three individual cases. In any event, the litigating positions of those offices cannot trump the plain statutory text.

IV. Even if *McDonnell Douglas* Applies, Ms. Young Has Presented Sufficient Evidence to Overcome Summary Judgment

UPS argues that this Court must apply the judicially created burden-shifting approach of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). UPS Br. 50-51. But *McDonnell Douglas* "does not apply in every employment discrimination case." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002). This Court crafted *McDonnell Douglas* to solve a particular problem – to smoke out hidden intent in cases in which the plaintiff's claim required proof of discriminatory motivation. Opening Br. 47-48. But the PDA's second clause does not require proof of such motivation. UPS's PDA violation is evident on the face of its policies. The *McDonnell Douglas* analysis has no place in this case, just as it has no place in a case alleging a denial of reasonable accommodation under Section 701(j). See *Hardison*, 432 U.S. at 76-81 (applying the requirements of

Section 701(j)'s plain text, without engaging in *McDonnell Douglas* burden-shifting).

Even if *McDonnell Douglas* does apply, Ms. Young has presented sufficient evidence to defeat summary judgment. UPS argues that Ms. Young did not make out a *prima facie* case, because she was not similarly situated to the non-pregnant drivers whom the company did accommodate. UPS Br. 55-56. To a large extent, this argument rests on UPS's broader argument that a "pregnancy-blind" policy insulates it from PDA liability. UPS does, however, make a series of factual arguments. These arguments reflect a highly selective and one-sided account of the summary judgment record. As the non-moving party, Ms. Young is entitled to have the record viewed in the light most favorable to her, with all of her evidence to be believed, and all justifiable inferences drawn in her favor. See, *e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (*per curiam*).

First, UPS argues that Ms. Young was not similarly situated to drivers given light duty for on-the-job injuries, because "[t]hose with occupational injuries were capable of doing 'work hardening' assignments to build up their muscles such that they could return to their regular job in a month." UPS Br. 55. But neither the collective bargaining agreement nor any other company document UPS provided in discovery mentions "work hardening," nor does the CBA place a time limit on light-duty work for on-the-job injuries. See J.A. 547-548. Even in her own declaration, UPS's occupational health manager said only

that light-duty work for on-the-job injuries was "generally" limited to 30 days. J.A. 569. UPS's Rule 30(b)(6) deponent also acknowledged that the 30-day period was not a "restriction" but only a "guideline" that could be extended at the discretion of the district's human resources and health and safety managers. J.A. 269. And the record contains 24 examples of bargaining-unit employees in Ms. Young's district who received Temporary Alternate Work (*i.e.*, light duty) for over 30 days for on-the job injuries – 15 of which involved periods of 40 or more days, including periods of 58, 62, 63, 73 (twice), and 510 days. See, *e.g.*, C.A.J.A. 1527-1541 (filed under seal).

Second, UPS argues that Ms. Young was not similarly situated to drivers with ADA disabilities, because her lifting restriction was temporary and did not substantially limit major life activities. UPS Br. 55. But the ADA requires employers to accommodate temporary lifting restrictions caused by conditions that constitute disabilities under the statute. Opening Br. 38-39. And the fact that Ms. Young's pregnancy did not substantially limit major life activities does not mean it was not similar in its effect on her ability to work to the ADA disabilities UPS accommodated. See *id.* at 39-40.

Third, UPS argues that Ms. Young was not similarly situated to drivers who lost their DOT certification, because "those who lost their DOT certification still needed to be able to engage in heavy lifting." UPS Br. 55-56. UPS again implicitly resolves factual disputes in its favor. UPS points to testimony

that a driver who lost her DOT certification due to a stroke was assigned to a job that required her to lift packages "over twenty-five – twenty pounds." UPS Br. 4 n.1. But the same driver testified that, when she returned from her stroke, she was assigned to a job as a clerk, in which she "[m]ade phone calls on packages that needed to be readdressed." J.A. 406. When asked, "What did you do other than making phone calls?" she answered, "That's it." *Id.* This factual dispute obviously cannot be resolved at summary judgment.

UPS also says, very generally, that "[a]ll of the other 'examples' offered by petitioner similarly required lifting of heavy packages. *Compare* J.A. 647 *with id.* at 366; *see also id.* at 448-49." UPS Br. 4 n.1. Yet examination of the cited pages reveals ample evidence that individuals who lost DOT certification were not always required to lift heavy loads. At page 647, for example, driver Mia Lynch testified that when she "lost [her] DOT card due to high blood pressure," she was reassigned to a job where she "only scanned packages and made address corrections, and put on address labels. [She] did not have to lift the packages, but [she] did have to flip them on the belt." The testimony at page 366 that a *different* driver, Yndia Brown, was required to lift heavy packages does not contradict that statement. And at pages 448 to 449, still *another* driver, Tammy Gatton, testified that when she returned to work after an off-the-job injury, she was initially required to do all of her original job tasks. But as the surrounding pages

of her deposition make clear (pages cited in our opening brief at 9), when Ms. Gatton proved unable to perform her original job tasks without accommodation, UPS allowed her temporarily to do a job that involved scanning, but not lifting, packages. J.A. 446-452.

UPS also contends that Ms. Young was not similar to drivers who lost DOT certification, because she could still drive while they could not. UPS Br. 56. Even if the factual premise for UPS's argument were true (but cf. Opening Br. 45), the argument is perverse. If UPS accommodates non-pregnant drivers who cannot perform the "quintessential function" of "be[ing] able to drive a commercial truck in interstate commerce," *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 579 (1999) (Thomas, J., concurring), then the PDA requires it to accommodate pregnant drivers who *can* still perform that function.

Even under *McDonnell Douglas*, an employer's choice of a *less* qualified non-pregnant employee over a *more* qualified pregnant one would be probative of discrimination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (observing that "the employer has discretion to choose among *equally qualified* candidates") (emphasis added); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-457 (2006) (*per curiam*) (plaintiffs' "evidence that their qualifications were superior to those of the two successful applicants" may "suffice, at least in some circumstances, to show pretext"). By using the phrase "similar" – not "the same" – "in their ability or inability to work," 42

U.S.C. § 2000e(k), the PDA adopts that same principle. If, as the record reflects, UPS accommodates drivers who have conditions that impose lifting restrictions and make them ineligible for DOT certification, it must treat pregnant drivers with similar lifting restrictions (but who retain DOT certification) the same.

Finally, UPS argues that Ms. Young forfeited the opportunity to establish pretext by not raising the pretext question in her petition. UPS Br. 56. But the court of appeals never reached the pretext question, so it would not have been proper to raise it in the petition. In any event, our petition-stage papers repeatedly argued that Ms. Young presented sufficient evidence of pretext. See Reply to Br. in Opp. 9 n.9; Young Supp. Br. 6-7.

As we showed in our opening brief (at 49-50), there was ample evidence of pretext. Most notably, even in its briefing before this Court UPS cannot identify a single non-pregnant driver with a similarly limiting condition to whom it denied an accommodation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SHARON FAST GUSTAFSON
ATTORNEY AT LAW, PLC
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sharon.fast.gustafson@gmail.com

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI 48109
(734) 647-7584
sambagen@umich.edu

SUPPLEMENTAL BRIEF

No. 12-1226

In The

Supreme Court Of The United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

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In his brief in response to this Court's invitation, the Solicitor General agrees that "the question presented is important and recurring." U.S. Br. 8. He also agrees that "the court of appeals erred in concluding that petitioner failed to establish a prima facie case." *Id.* at 14. Indeed, the Solicitor General agrees that "a majority of the courts of appeals (including the court of appeals in this case) to have considered claims similar to petitioner's have erred in interpreting Title VII's requirement that employers treat employees with pregnancy-related limitations as favorably as nonpregnant employees who are similar in their ability or inability to work." *Id.* at 8. And he also agrees that "the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case." *Id.* at 17.

Based on these points alone, this Court should grant the petition for *certiorari*. The government's unwarranted (and extremely hedged) statements that Young's claim "apparently" would have failed in the Sixth Circuit, and that "it is unclear" whether Young's claim would have succeeded in the Tenth (*id.* at 19)—and its suggestion that this Court should wait for indefinite, uncertain, and irrelevant future events—do not undermine the case for granting the petition.

A. The Solicitor General's Brief Underscores the Error of the Court of Appeals

The Pregnancy Discrimination Act (PDA) provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as

other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By providing accommodated work to employees who have lifting restrictions due to on-the-job injuries, ADA-qualifying disabilities, or conditions that render them ineligible for Department of Transportation certification, but denying accommodated work to employees whose restrictions stem from pregnancy, UPS violated that statutory command. See Pet. 9-16; Reply to Br. in Opp. 1.

The court of appeals resisted that conclusion on the ground that UPS's accommodated-work policies were "pregnancy-blind"—that is, that UPS would not deny accommodated work to a pregnant employee who also, for example, had an on-the-job injury. Pet. App. 18a. As we showed in our petition and reply brief, that position directly conflicts with the PDA's text, legislative history, and acknowledged purpose. See Pet. 9-16; Reply Br. 1-8.

The Solicitor General decisively agrees with our position on that point. As the Solicitor General's brief explains, "[i]n enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations." U.S. Br. 13. Rather, "Congress distinguished among employees based on the work-related *effect* of their work limitations." *Id.* Under the correct analysis, the Solicitor General explains, "the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries," and "it appears that the courts below erred in finding no genuine issue of material fact about whether drivers who lose their DOT certifications are similar to petitioner in their ability to work." *Id.* at 14-15.

The Solicitor General thus contends that "the court of appeals erred in concluding that petitioner failed to establish a prima facie case." *Id.* at 14. Indeed, he submits that "most of the courts of appeals to have considered this issue have erred in interpreting the PDA by ignoring the textual requirement that a court compare pregnant employees to other employees 'not so affected but similar in their ability or inability to work.'" *Id.* at 20 (quoting 42 U.S.C. § 2000e(k)). And the Solicitor General observes that the Fourth Circuit's holding here—like the holdings of the Fifth, Seventh, and Eleventh Circuits on which that court relied—is also inconsistent "with the longstanding position of the EEOC." *Id.* at 15.

As the Solicitor General explains, "the question presented is important to many women in the workplace and to their families." *Id.* at 20. Review of that question is necessary to reaffirm the primacy of the statutory text and the views of the agency that enforces Title VII.

B. The Solicitor General's Brief Acknowledges the Disagreement in the Circuits

In our petition and reply brief, we showed that there is a longstanding division in the lower courts regarding the question presented. Pet. 16-21; Reply to Br. in Opp. 8-9. Indeed, that division has become even more firmly entrenched since the initial briefing on the petition for *certiorari*.

In affirming summary judgment to UPS, the Fourth Circuit expressly aligned itself with the decisions of the Fifth, Seventh, and Eleventh Circuits—and declared itself "compelled to disagree" with the Sixth Circuit's decision in *Ensley-Gaines v. Runyon*,

100 F.3d 1220 (6th Cir. 1996). See Pet. App. 23a. (As we show in our petition, Pet. 18-19, the Fourth Circuit's decision was also inconsistent with the law in the Tenth Circuit.) In its brief in opposition, UPS questioned the continuing vitality of *Ensley-Gaines* in the Sixth Circuit. Opp. 23. But in its more recent decision in *Latowski v. Northwoods Nursing Center*, 549 Fed. Appx. 478, 484-485 (6th Cir. 2013), the Sixth Circuit expressly relied on *Ensley-Gaines* in ruling in favor of a pregnant worker, Latowski, who had sought an accommodation for her 50-pound lifting restriction. Latowski presented evidence that her employer provided light-duty work to employees with similar lifting restrictions who had been injured on the job. "Although these employees differed from Latowski because their medical conditions were work-related," the Sixth Circuit concluded that "they were similarly situated in their ability to work" and thus that "Latowski ha[d] presented sufficient evidence to establish a prima facie case of pregnancy discrimination." *Id.* The Sixth Circuit accordingly reversed the district court's grant of summary judgment to the employer. See *id.* at 488. *Latowski* resolves any doubt about whether *Ensley-Gaines* remains good law in the Sixth Circuit, and it underscores the need for this Court to intervene to resolve the conflict in the circuits.

The government acknowledges that "the Sixth and Tenth Circuits do differ from the court below in their analysis of whether a plaintiff in petitioner's position has established a prima facie case." U.S. Br. 17. But it suggests that the Court should deny the petition because Young's "claim apparently would not fare any better in the Sixth Circuit than it did in the Fourth," and because "it is unclear whether she could

ultimately prevail in the Tenth Circuit." *Id.* at 19. The government says that the Sixth and Tenth Circuits might have concluded that UPS's policy of granting accommodated work only to those injured on the job (and so forth) makes out a prima facie case of discrimination—but that those courts may have nonetheless concluded that the same "pregnancy-blind" policy that established the prima facie case would itself constitute legitimate, nondiscriminatory reasons that would rebut that case. See *id.* at 18-20.

It is notable what the government does *not* say here. First, the government does *not* say that Young's claim would have failed had the lower courts applied the interpretation of the PDA that the Solicitor General's brief itself endorses. To the contrary, that brief explicitly *rejects* the position it ("apparently," though "it is unclear") attributes to the Sixth and Tenth Circuits. The Solicitor General explains that a policy of providing accommodated work only to those injured on the job cannot in and of itself constitute a legitimate, nondiscriminatory reason that rebuts a prima facie case under the PDA: "Because a policy that treats employees with limitations resulting from on-the-job injuries more favorably than employees with comparable limitations resulting from pregnancy presents a prima facie case of discrimination, an employer cannot rebut such a prima facie case merely by pointing to the existence of the policy." U.S. Br. 14 n.3.

Second, and more important, the government is incorrect to insinuate ("assert" is too strong a word, given the government's hedging) that Young's claim would have failed in the Sixth and Tenth Circuits. Even if the proof structure of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to a

claim like Young's[1]—and even if the "pregnancy-blind" accommodated-work policy that creates the prima facie case can at the same time operate as a "legitimate, nondiscriminatory reason," *id.* at 802, that rebuts that case[2]—Young must still have the opportunity to prove that the reason was a "pretext for discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 512, 515 (1993) (internal quotation marks omitted).

There was ample evidence of pretext here—certainly enough to create a genuine issue of material fact. Unlike in the many reported cases in which employers have accommodated only those injuries acquired on the job, the testimony here showed that UPS would accommodate many off-the-job injuries and illnesses as well. See Pet. 4-5 (noting testimony stating that ineligibility for DOT certification could arise from diseases or injuries acquired outside of work and giving examples of UPS drivers relieved of lifting duties as a result of out-of-work illnesses and injuries). A trier of fact could reasonably conclude

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[1] Failing to treat "women affected by pregnancy * * * *the same* * * * as other persons not so affected but similar in their ability or inability to work" violates the plain terms of the PDA, 42 U.S.C. § 2000e(k). Where an employer (like UPS) has a policy that provides accommodated work to significant classes of workers who are "similar in their ability or inability to work" as pregnant workers, but does not provide the same accommodations to workers who request them because of pregnancy, the violation of the statute is apparent even without resort to the judge-made proof framework of *McDonnell Douglas*.

[2] Notably, the government does not claim that the Tenth Circuit has held that the very policy that creates the prima facie case can also constitute the legitimate, nondiscriminatory reason rebutting that case. It argues only that "at least the Sixth Circuit" has adopted such a rule (U.S. Br. 20) and that the Tenth Circuit's position is "unclear" (*id.* at 19).

that, given the wide array of circumstances in which UPS provides accommodated work, the failure to provide accommodated work for pregnancy does not reflect a pregnancy-neutral policy but instead bespeaks discriminatory intent. The statement of Young's division manager that "she was 'too much of a liability' while pregnant and that she 'could not come back into the [facility in which she worked] until [she] was no longer pregnant" (Pet. App. 8a) would have provided further support for a finding of pretext.

The court of appeals ruled that Young had not presented sufficient evidence of a prima facie case to overcome summary judgment. It thus ruled against Young without reaching the question of pretext. See Pet. App. 25a-29a. Tellingly, the government makes no effort to explain why the evidence was insufficient to create a genuine issue of material fact on the pretext question. But its suggestion that the Sixth and Tenth Circuits might also have ruled against Young necessarily depends on the premise that the evidence of pretext was insufficient. Because the government fails even to attempt to establish that premise, its suggestion that Young would be "unlikely to prevail" in the Sixth or Tenth Circuits (U.S. Br. 20) cannot be taken seriously.

The Solicitor General's brief makes clear that the circuits disagree on the question presented, and that the disagreement focuses on the very issue that led the court of appeals to reject Young's claim—whether a "pregnancy-blind" accommodated-work policy can make out a prima facie case. The disagreement in the circuits thus was directly consequential to the outcome below. This Court should grant the petition tc resolve that disagreement.

C. This Court Should Not Wait to Resolve the Question Presented

The Solicitor General suggests that the enactment of the ADA Amendments Act (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, may address the problems caused by the "erroneous interpretations of [the PDA] adopted by several courts of appeals." U.S. Br. 20. The Solicitor General substantially overstates the effect of the ADAAA.

The ADAAA expanded the definition of "disability" in the ADA, 42 U.S.C. § 12102. But it did not eliminate the prior statutory requirement that, to constitute a disability, a condition must be an "impairment." *Id.* at § 12102(1)(A). The EEOC's regulations define "impairment" as a "physiological disorder or condition, cosmetic disfigurement, or anatomical loss," or a "mental or psychological disorder." 29 C.F.R. § 1630.2(h). As the EEOC made explicit in the interpretive guidance accompanying those regulations, "conditions, such as pregnancy, that are not the result of a physiological disorder" are "not impairments." 29 C.F.R. Part 1630 App. § 1630.2(h).

To be sure, under the ADAAA definition employers will be required to provide reasonable accommodations to workers whose pregnancies result in additional physiological disorders (such as preeclampsia) that are themselves impairments. But that would provide no relief in a case like this one. Young's lifting restriction resulted from the ordinary incidents of pregnancy and not any additional disorders.

Young's situation is common in the reported cases. Pregnant workers often seek accommodated

work, not because of any physiological disorder, but simply because their doctors have advised them that a restriction on lifting will maintain a healthy pregnancy. See, *e.g.*, *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 638-39 (6th Cir. 2006) (plaintiff's physician "restricted her to light work pending her first appointment with an obstetrician," and her obstetrician then "told her not to lift more than 20 pounds" but that "'everything was normal and that she could continue to work,' if she performed light work only"); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1311 (11th Cir. 1999) ("Soon after discovering she was pregnant, Appellant developed concerns that lifting a patient on her assigned hall who weighed almost 250 pounds could cause harm to her unborn child. * * * She was told by Appellee to obtain a doctor's verification of the restriction and she consequently obtained a restriction from her obstetrician which imposed a lifting limitation of 25 pounds."). See also Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 19 (2009) (many requests for accommodation involve "avoidance guided by potential risk to mother or fetus (for example, a doctor's restriction on lifting heavy objects or exposure to contagions)").

While the ADAAA may incidentally guarantee accommodations for some pregnant workers, it does nothing for Young and the many other pregnant workers like her. More fundamentally, it does not advance the basic purpose of the PDA—to ensure that pregnant workers are "treated the same" as valued employees who are not pregnant. 42 U.S.C. § 2000e(k). When employers provide accommodated

work to employees who request them due to workplace injuries, but not to employees who request them due to pregnancy, they violate the PDA's mandate even in the many circumstances in which pregnancy occasions no disability under the ADA. Because so many lower courts have repeatedly misconstrued the PDA in those circumstances, this Court's intervention is necessary.

The government suggests (U.S. Br. 21), that now that the ADA requires employers to accommodate some (nonpregnant) employees with temporary conditions, the courts in the Fourth, Fifth, Seventh, and Eleventh Circuits may demand that employers provide pregnant workers the same accommodations as they provide to ADA-qualifying employees. That suggestion misunderstands the position of those circuits. Those courts have held that, so long as an employer acts pursuant to a "pregnancy-blind" policy, it can refuse to provide accommodations to pregnant workers without violating the PDA. See Pet. 12, 20-21. And, as the Fourth Circuit expressly held here, a "policy limiting accommodations to those employees * * * disabled as defined under the ADA" is "a pregnancy-blind policy." Pet. App. 18a. As *amici* law professors and womens' rights groups explained (Amicus Br. 11-14), so long as the Fourth Circuit's holding remains the majority position in the lower courts, the breadth of the ADAAA will actually operate to *diminish* the protections accorded to pregnant workers like Young. That is a compelling reason to grant *certiorari* now.

Nor is there any reason to wait for the EEOC to issue "new enforcement guidance on pregnancy discrimination." Cf. U.S. Br. 21. The Solicitor General offers no date by which the EEOC would issue

such guidance, nor does he represent that the Commission has made a definite (or even tentative) decision to issue such guidance. All the Solicitor General can state is that "the EEOC is currently considering the adoption of" such guidance. *Id.*

More to the point, the Solicitor General's own brief states that a "majority of the courts of appeals," *id.* at 8, have decided the question presented in a way that conflicts with "the longstanding position of the EEOC" as expressed in guidance dating back to 1979, *id.* at 15-17. The Solicitor General does not offer a single reason to think that *new* guidance from the EEOC will change this situation. Such an indefinite, indistinct possibility can hardly be a basis for this Court to defer deciding an issue that the Solicitor General himself acknowledges is "important and recurring" and has divided the circuits.

CONCLUSION

The petition should be granted.

Respectfully submitted,

SHARON FAST GUSTAFSON
4041 N. 21st St.
Arlington, VA 22207
(703) 527-0147
sf.gustafson@verizon.net

SAMUEL R. BAGENSTOS
Counsel of Record
MICHIGAN CLINICAL
LAW PROGRAM
625 S. State St.
Ann Arbor, MI
(734) 647-7584
sambagen@umich.edu

Counsel for Petitioners

JUNE 2, 2014

SUPPLEMENTAL BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
RACHEL S. BRASS
JENNA M. YOTT
MARISA C. MALECK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondent

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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SUPPLEMENTAL BRIEF FOR RESPONDENT

The petition for a writ of certiorari should be denied because, as the government explains, this case would have been decided the same in every circuit (U.S. Br. 17-20) and in any event the question presented does not warrant review in light of intervening legislation (*id.* at 20-22). Moreover, the government does not dispute that the collective bargaining agreement here makes this case a poor vehicle, particularly since petitioner pursues only a disparate treatment claim.

I. PETITIONER'S CASE IMPLICATES NO CONFLICT AMONG THE CIRCUITS

Petitioner contends that there is "longstanding disagreement in the circuits" regarding "whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Pet. i, 16 (capitalization altered); Pet. Supp. Br. 3. As UPS has previously explained (Br. in Opp. 22-29), petitioner is simply incorrect regarding this supposed circuit conflict. The government's brief confirms that this case would have been decided the same way in *every* circuit. *See* U.S. Br. 17-20.

The sole question presented is whether an employer intentionally violates the Pregnancy Discrimination Act amendment to Title VII, 42 U.S.C. § 2000e(k) ("PDA"), by adhering to a pregnancy-neutral policy that, pursuant to the terms of the applicable collective bargaining agreement covering the employee, does not allow for the requested accommodation. The courts of appeals unanimously recognize

that a policy under which physical restrictions resulting from on-the-job activity may be accommodated, while off-the-job restrictions are not, does not constitute disparate treatment. *See* Br. in Opp. 17-29.

As the government recognizes, the "majority of the courts of appeals" (including the Fourth Circuit in the decision below) have held that a pregnant employee cannot make out a *prima facie* case simply by relying on a pregnancy-neutral policy that provides accommodations to certain groups of persons. U.S. Br. 8. The only outliers are the Sixth and Tenth Circuits. *See id.* at 18-19. Petitioner stakes her bid for certiorari review on language from opinions of those two courts. Pet. Supp. Br. 3-4; Pet. 17-19.

Since UPS filed its brief in opposition, the Tenth Circuit has abandoned dicta in *Equal Employment Opportunity Commission* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000), holding that a pregnant worker (whose condition does not result from an on-the-job injury) is "not similarly situated" to employees who were injured on the job. *Freppon* v. *City of Chandler*, 528 F. App'x 892, 902 (10th Cir. 2013). Moreover, even the Sixth Circuit does not accept petitioner's extreme suggestion that every employee who requests an accommodation must be treated identically. *See Raciti-Hur* v. *Homan*, 181 F.3d 103, 1999 WL 331650, at *6 (6th Cir. 1999) (per curiam) (unpublished table decision) (affirming finding that pregnant employee was not similar in her ability to work to two permanently disabled workers and finding it "appropriate under the Pregnancy Discrimination Act to consider, as one factor, the temporal nature of the plaintiff's disability").

Petitioner contends that the government "decisively agrees" that the PDA dos not permit employers to "'distinguish among employees based on the *source* of their work limitations.'" Pet. Supp. Br. 2 (quoting U.S. Br. 13). But the distinction between on-the-job injuries and off-the-job injuries is engrained in the American workplace, and enshrined in many collectively bargained agreements. Indeed, the government has consistently taken the position—in defending suits brought by *its own* employees—that the PDA does *not* require an employer to accommodate limitations resulting from off-the-job activity simply because it accommodates limitations resulting from on-the-job activity. *See, e.g.*, Reply Brief for Postmaster General at 8, *White v. Frank*, 8 F.3d 823 (4th Cir. 1993) (No. 92-1579) (a pregnancy-blind policy "in no way discriminates on the basis of pregnancy. Rather, the policy 'discriminates' on the basis of whether or not the disabling condition was or was not job-related."); *see also* Brief for Postmaster General at 27-28, *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) (No. 95-1038) (same).

Even if there were more than a nominal circuit split on the comparator question at the *prima facie* stage of a pregnancy discrimination case, any difference in analytics would be inconsequential to the outcome in *this* case. The United States recognizes that proving a *prima facie* case does not end the analysis. U.S. Br. 14. Once an employee makes out a *prima facie* case, an employer may proffer a nondiscriminatory reason to deny the accommodation, and the employee must then show that the proffered reason is merely a pretext for discrimination. *Id.* at 14-17.

Petitioner's reliance on *Latowski v. Northwoods Nursing Center*, 549 F. App'x 478 (6th Cir. 2013)

(Pet. Supp. 4), underscores this point. There, the court held that the pregnant employee had made out a *prima facie* case, but nevertheless considered the rest of the *McDonnell-Douglas* framework and held that an employer's "economics-based policy of refusing to accommodate restrictions arising from injuries incurred outside the workplace" constitutes a "legitimate, nondiscriminatory reason" for an employment action. 549 F. App'x at 484; *see also Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006) (holding that a PDA claim failed because the application of a pregnancy-blind policy is a legitimate nondiscriminatory reason for an employment action and there was no evidence of pretext).

As the government correctly recognizes, at the *pretext* stage "petitioner's claim would not have fared any better" in *any* of the courts of appeals. U.S. Br. 17. All of the circuits, the United States explains, "would likely hold that an employer may accommodate on-the-job injuries without accommodating pregnancy-related limitations, at least absent other evidence of animus or any suggestion that the policy was not applied uniformly." *Id.* at 17-18. The government points to no evidence of pretext, nor does it dispute UPS's argument that there is no such evidence in the record. Br. in Opp. 27-28.

Petitioner nevertheless contends—at the eleventh hour—that there is "ample evidence" of pretext in the record. Pet. Supp. Br. 6. Specifically, petitioner points to a stray comment allegedly made by a UPS manager—who had no decisionmaking authority with respect to petitioner—to the effect that she was a "liability." *Id.* at 6-7. But this statement does not raise a genuine issue of material fact regarding pretext—as the district court expressly found. Pet. App. 62a. As that court explained, the complained-of

comment did not "cast doubt" on the validity of UPS's pregnancy-blind policy. *Id.* at 63a (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 216 (4th Cir. 2007)). The Fourth Circuit did not question the district court's finding that "[t]here is no evidence of pretext" (*ibid.*), and factual quibbles with the district court's findings are not grounds for certiorari review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner is also wrong to suggest that she was treated unlawfully in light of UPS's policy of accommodating drivers who lose their Department of Transportation ("DOT") certificates. Pet. Supp. Br. 6. Under that policy, UPS provides "temporary alternative work"—not necessarily the light duty work petitioner requested—to its employees who lose their DOT certification for whatever reason. *See* Br. in Opp. 3. This is a negotiated provision of the collective bargaining agreement ("CBA") between UPS and the Teamsters, which (like other accommodations) directly involves seniority rights of union members. Petitioner has not identified any evidence suggesting that her union and UPS intended to discriminate against pregnant women when crafting that policy. Moreover, all drivers who lose their DOT certification are dissimilar to petitioner because they are *legally precluded* from driving a UPS vehicle (*id.* at 7), making their physical abilities irrelevant. Indeed, many drivers lose their DOT certifications from events—such as vehicular citations or accidents—that have nothing to do with physical limitations. And many "inside jobs" provided to such employees involve lifting packages in excess of the limitations imposed on petitioner. Petitioner—who bore the burden of proof—not only failed to adduce competent

evidence that she was similarly situated to employees who lost their DOT certificates, but also that UPS's policy of providing different accommodations to those differently situated employees evidenced pretext.

II. The ADAAA Deprives The Question Presented Of Practical Significance

UPS previously explained that the enactment of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") renders review of petitioner's claim under the PDA moot as a practical matter. Br. in Opp. 29. The government confirms the correctness of this position. U.S. Br. 20-21.

As the government recognizes, the ADAAA and its implementing regulations broadened the definition of disability to include disabilities of limited duration. *See* 42 U.S.C. § 12101; 29 C.F.R. § 1630.2(i), (j). While pregnancy per se is not an ADA-covered disability, temporary physical limitations imposed because of pregnancy may be within the ADA's reach—but as the amendments are not retroactive, the Fourth Circuit did not consider how the augmented framework might apply to petitioner's case. Pet. App. 11a, n.7. It is entirely possible, however, that the question presented in this petition will not recur: If courts construe the ADA (as amended) to cover pregnant workers subject to lifting restrictions like petitioner's, that statute, unlike the PDA, would expressly require accommodation.

Contrary to petitioner's suggestion otherwise (Pet. Supp. Br. 8-9), the Equal Employment Opportunity Commission ("EEOC") has recommended just this construction of the ADA. Indeed, it has stated that "[c]ertain impairments resulting from pregnancy . . may be considered a disability if they substantially limit a major life activity." *See* EEOC, *Ques-*

tions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, Q. & A. 23, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 4, 2014). The EEOC specifically considers "[m]ajor life activities" to include "lifting" (29 C.F.R. § 1630.2(i)(1)(i)), and construes the term "substantially limits" "broadly in favor of expansive coverage" (*id.* § 1630.2(j)(1)(i)). Moreover, a pregnancy-related impairment may also meet the definition of a disability, according to the EEOC, if it acts as a "record of a substantially limiting impairment," or creates a circumstance where an employee is "regarded as" disabled, and is subsequently discriminated against by an employer. *See* 29 C.F.R. 1630.2. Additionally, the EEOC confirms that "[t]he ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability." EEOC, *Pregnancy Discrimination*, http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited June 4, 2014).

Petitioner's contrary argument regarding the ADAAA borders on the incomprehensible. Pet. Supp. Br. 8-11. Her conclusion is that "the ADAAA does nothing for [her] and the many other pregnant workers like her." *Id.* at 9. If by that she means individuals who sued before the ADAAA was enacted cannot take advantage of the amendments, the point is tautological, but irrelevant. If she means that pregnant persons with lifting restrictions will not be entitled to accommodations under the ADAAA, she simply disagrees with the EEOC. What she cannot mean—and does not say—is that the ADAAA (which, unlike the PDA, is expressly focused on employer *accommodation* of physical impairment) has no role to play in future cases involving employer accommodation of pregnancy-related physical impairments. Indeed, the government represents that the EEOC is preparing more guidance that will further clarify

these issues related to pregnancy under the PDA and the ADA as amended. U.S. Br. 8, 21-22. Therefore, review of the decision in this case would be premature.

III. This Case Is A Poor Vehicle

Notably, the government does not dispute that the CBA between UPS and the Teamsters Union is a significant additional factor that militates against certiorari review in this case. *See* Br. in Opp. 29-33.

Some CBAs—like the one at issue in this case—directly address, in advance, an employer's obligation to provide light-duty work and other accommodations. These provisions must be viewed in light of the broader purposes of the National Labor Relations Act, 29 U.S.C. §§ 151-169, in affording workplace stability through comprehensively negotiated agreements.

The CBA governing the employment relationship between UPS and petitioner adds a layer of factual and legal complication that makes this case ill-suited for consideration. This Court could not address the issues in this case without considering the UPS-Teamsters CBA, including its bona fide seniority system and the express provisions made for light-duty (and other temporary alternative) work assignments in the context of an employment relationship that necessarily relies heavily on manual labor. *See* 42 U.S.C. § 2000e-2(h).

This is especially so because petitioner is preceding solely on a disparate *treatment* theory and thus must make the strained argument that the Teamsters Union—her bargaining representative, which is *not* a party to this litigation—engaged in intentional discrimination by not requiring (or permitting) light-duty work in her circumstances during the CBA negotiations. *See* Pet. Reply Br. 7-8. If the CBA itself

is not actionable as intentional discrimination, then UPS cannot be held liable for disparate treatment under the PDA by adhering to the CBA's terms and treating petitioner exactly the same as all its other employees—male and female—who are under a lifting restriction due to an off-the-job activity.

UPS's conduct in this case was entirely consistent with the litigating positions taken by the Department of Justice in PDA actions brought by Postal Service employees. The National Agreement between the United States Postal Service and the American Postal Workers Union AFL-CIO similarly limits light duty assignments to "employees who are temporarily or permanently incapable of performing their normal duties as a result of a job-related compensable illness or injury." USPS-APWU Joint Contract Interpretation Manual, art. 13.1 (2012). As explained above, the government has (correctly) drawn the same distinction between on-the-job and off-the-job impairments that the court below relied on to reject petitioner's disparate treatment claim.

UPS's conduct in this case was also entirely consistent with extant EEOC guidance, which is very clear on this point: "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." EEOC, *EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute*, http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (last visited June 4, 2014); *see* Br. in Opp. 25-26 & n.2. The EEOC guidance cited by the government (U.S. Br. 16), in contrast, does not deal with the distinction between off-the-job and on-the-job conditions, and thus—regardless of its correctness—it is inapplicable to the situation presented here. Indeed, the EEOC has previously, and express-

ly, "waived off" the argument that "any distinction between nonwork-related conditions and work-related conditions, in a modified duty policy, is per se unlawful." EEOC Br. in Resp. to Pet. for Reh'g En Banc, *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (No. 98-2328), *available at* http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (last visited June 4, 2013).

Given that the EEOC has recently announced that accommodating pregnancy-related limitations under the ADAAA and the PDA is among its top enforcement priorities (EEOC, *U.S Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016*, http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 4, 2014)), the government's recommendation that certiorari be denied in this case takes on special significance. The agency vested with primary authority to oversee this provision of Title VII has determined, for reasons stated and unstated, that petitioner's case does not warrant plenary review by this Court. UPS respectfully submits that, while we do not agree with every statement in the government's brief, the bottom line is correct: There is no compelling reason for the Court to review the question presented in this case at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
RACHEL S. BRASS
JENNA M. YOTT
MARISA C. MALECK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondents

June 4, 2014

AMICUS CURIAE BRIEF

No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MOLLY J. MORAN
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DENNIS J. DIMSEY
HOLLY A. THOMAS
BONNIE I. ROBIN-VERGEER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JULIE L. GANTZ
Attorney
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

The Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." The question presented is whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work."

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In the Supreme Court of the United States

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INTEREST OF THE UNITED STATES

This case presents the question whether, and in what circumstances, Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, as amended by the Pregnancy Discrimination Act (PDA), 42 U.S.C. 2000e(k), requires an employer that provides work accommodations to nonpregnant employees with work limitations to provide comparable work accommodations to pregnant employees who are "similar in their ability or inability to work." 42 U.S.C. 2000e(k). The Attorney General enforces Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the United States Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(a) and (f)(1). In addition, Title VII applies to the United States in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16. The

United States, as the principal enforcer of the federal civil rights laws and the Nation's largest employer, has a substantial interest in the proper interpretation of Title VII, as amended by the PDA. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it unlawful for an employer to, *inter alia*, "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[] because of such individual's * * * sex." 42 U.S.C. 2000e-2(a). In 1976, this Court held that an employer's refusal to cover pregnancy under a disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 135-140. In 1978, Congress overruled that holding by enacting the Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076. *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 670 (1983). The PDA added the following subsection to Title VII's "Definitions" section:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection

> shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. 2000e(k).

b. On July 14, 2014 (after this Court granted the petition for a writ of certiorari in this case), the EEOC issued updated enforcement guidance on the application of the PDA and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, to pregnant workers. EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July 14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (*EEOC Pregnancy Guidance*); cf. U.S. Petition-stage Amicus Br. 21-22. The guidance expands on the Commission's long-held view that "[a]n employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay." *EEOC Pregnancy Guidance* Pt. I.C. In particular, the guidance explains that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's

limitation (e.g., a policy providing light duty only to workers injured on the job)." *Id.* Pt. I.A.5; see *id.* Pt. I.C.1.b ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation. Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work.").

2. Petitioner began working for respondent in 1999. Pet. App. 4a. In 2002, petitioner started driving a delivery truck for respondent, and by 2006, she was working as a part-time early-morning driver (also known as an "air driver"). *Ibid.* Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. *Ibid.* She and other drivers met a shuttle from the airport, transferred packages to their vans, and delivered the packages. *Id.* at 4a-5a, 31a-33a. Respondent required air drivers such as petitioner to be able to "lift, lower, push, pull, leverage and manipulate" items "weighing up to 70 pounds" that were not oddly shaped. *Id.* at 3a, 31a-33a.

In July 2006, petitioner was granted a leave of absence from work to pursue in vitro fertilization treatments. Pet. App. 5a. Petitioner became pregnant and sought to extend her leave. *Ibid.* In September 2006, before she was ready to return to work, petitioner provided her supervisor with a physician's note indicating that petitioner "should not lift more than twenty pounds for the first twenty weeks of her pregnancy and not more than ten pounds thereafter." *Ibid.* During a follow-up phone call, petitioner's supervisor told her that respondent's policy would not permit

petitioner to return to work while she had a 20-pound lifting restriction. *Ibid.* Petitioner protested that she was rarely called upon to lift more than 20 pounds in her role as an air driver. *Ibid.* In October 2006, petitioner obtained a note from a midwife confirming that petitioner should not lift more than 20 pounds. *Id.* at 5a-6a.

Petitioner later contacted her supervisor and requested to return to work. Pet. App. 6a. She was referred to respondent's occupational health manager (Carol Martin), who determined that petitioner was unable to perform the essential functions of her job and was ineligible for reassignment to a light-duty position. *Id.* at 5a-6a. Respondent offered light-duty work assignments (on a temporary or permanent basis) only to (1) employees who were injured on the job; (2) employees who were eligible for accommodations under the ADA; and (3) drivers who had lost their Department of Transportation (DOT) certification because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. *Id.* at 3a-4a, 6a-7a. Martin explained to petitioner that respondent did not offer such accommodations to employees with pregnancy-related limitations. *Id.* at 7a.

In November 2006, petitioner approached her Division Manager and explained her desire to return to work. Pet. App. 7a-8a. The manager told petitioner that she was "too much of a liability" while pregnant and that she could not come back into the building until she was no longer pregnant. *Id.* at 8a. When petitioner's leave expired later that month, she took an extended leave of absence without pay and ultimately lost her medical coverage. *Ibid.* She returned

to work for respondent after giving birth in April 2007. *Ibid.*

3. In July 2007, petitioner filed a charge with the EEOC, alleging discrimination on the basis of race, sex, and pregnancy. Pet. App. 8a. After the EEOC issued a right to sue letter, petitioner filed suit seeking damages for intentional race and sex discrimination under Title VII and for disability discrimination under the ADA. *Id.* at 8a-9a. In February 2011, the district court granted summary judgment to respondent.[1] *Id.* at 9a-10a, 30a-83a.

With respect to petitioner's PDA (sex-discrimination) claim, the district court concluded first that petitioner had not provided any direct evidence of discrimination. Pet. App. 51a-57a. In particular, the district court concluded that respondent's policy of providing assignment accommodations only to limited groups of employees was not facially discriminatory because respondent identified those groups without reference to gender. *Id.* at 55a-57a. The court then held that petitioner had not established a prima facie case of discrimination because she had not identified similarly situated employees who were treated more favorably than she. *Id.* at 57a-62a. Finally, the dis-

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[1] The district court granted summary judgment to respondent on petitioner's race-discrimination claim and petitioner did not appeal that ruling. Pet. App. 9a n.5, 63a-66a. The district court also granted summary judgment to respondent on petitioner's disability-discrimination claim. *Id.* at 9a, 66a-77a. The court of appeals affirmed that ruling, *id.* at 11a-16a, and petitioner does not challenge that holding in her petition for a writ of certiorari. In addition, the court of appeals upheld the district court's denial of petitioner's motion to amend her complaint to include a disparate-impact claim, *id.* at 10a n.6, and petitioner does not challenge that holding in her petition.

trict court held that, even if petitioner had established a prima facie case, she had not demonstrated that respondent's proffered nondiscriminatory reason for not allowing her to return to work (*i.e.*, that she could not perform the essential duties of the job of air driver) was pretextual. *Id.* at 62a-63a.

4. The court of appeals affirmed. Pet. App. 1a-29a.

First, the court agreed with the district court that petitioner had not presented any direct evidence of sex discrimination because respondent's policy of "limiting accommodations to those employees injured on the job, disabled as defined under the ADA, and stripped of their DOT certification" is "pregnancy-blind." Pet. App. 18a; see *id.* at 17a-24a. The court of appeals rejected petitioner's argument that, as amended by the PDA, Title VII requires employers to treat pregnant workers as favorably as it treats nonpregnant workers who are similar in their ability to work, even when the employer does not provide the same favorable treatment to *all* nonpregnant employees who are similar in their ability to work. *Id.* at 18a-24a. The court acknowledged that Title VII provides that "women affected by pregnancy, child-birth, or related medical conditions shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." *Id.* at 19a-20a (quoting 42 U.S.C. 2000e(k)). In spite of what the court viewed as the "unambiguous" language of that statutory text, the court concluded that that language "does not create a distinct and independent cause of action" and does not require that pregnancy "be treated more favorably than any other basis." *Id.* at 20a-21a.

Second, the court of appeals agreed with the district court that petitioner failed to establish a prima facie case of discrimination under the burden-shifting analysis established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. 25a-29a. Under that framework, the court explained, a plaintiff must show "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment." *Id.* at 25a-26a (quoting *Gerner* v. *County of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012)). The court of appeals concluded that petitioner had made the first three required showings, but had failed to raise a genuine issue of fact as to whether similarly situated employees outside her protected class received more favorable treatment. *Id.* at 26a-29a. The court reasoned that a pregnant worker subject to a temporary lifting restriction is "not similar in her 'ability or inability to work' to an employee disabled within the meaning of the ADA or an employee either prevented from operating a vehicle as a result of losing her DOT certification or injured on the job." *Id.* at 27a. The court explained that petitioner was dissimilar to an employee entitled to an ADA accommodation because petitioner's "lifting limitation was temporary." *Ibid.* The court further explained that petitioner was not similar to those who had lost DOT certification both because "no legal obstacle stands between [petitioner] and her work," and because those individuals "maintained the ability to perform any number of demanding physical tasks." *Id.* at 27a-28a. Finally, the court explained that petitioner "is not similar to employees injured on the job because, quite

simply, her inability to work does not arise from an on-the-job injury." *Id.* at 28a. The court ultimately concluded that, because petitioner had not "establish[ed] that similarly situated employees received more favorable treatment than she did," she had failed to "establish the fourth element of the prima facie case for pregnancy discrimination." *Id.* at 29a.

SUMMARY OF ARGUMENT

A. Respondent violated Title VII when it refused to provide petitioner with the accommodation it provided to other employees similar to petitioner in their ability or inability to work. Congress enacted the Pregnancy Discrimination Act in 1978 to overturn this Court's holding in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that an employer's policy of treating pregnancy-related disabilities less favorably than all other disabilities did not violate Title VII. The PDA amended Title VII to make clear—as the court of appeals conceded, "unambiguous[ly]" clear, Pet. App. 20a—that an employer discriminates on the basis of sex when it treats pregnant employees with work limitations less favorably than nonpregnant employees who are "similar in their ability or inability to work," 42 U.S.C. 2000e(k).

A plaintiff can establish a violation of Title VII's prohibition on sex discrimination by introducing direct evidence of an employer's policy that treats a class of nonpregnant employees with work limitations more favorably than it treats employees with comparable limitations related to pregnancy. Such a policy cannot be justified with reference to the source of an individual plaintiff's work limitation. The text of Title VII focuses entirely on whether a pregnant employee is similar in her ability to work to a nonpregnant em-

ployee, not on why each employee has the relevant limitation. In this case, it is undisputed that respondent treats at least some nonpregnant employees (employees who sustain on-the-job injuries) more favorably than it treats pregnant employees with similar limitations. That is sufficient to establish a violation of Title VII, and the courts below erred in holding otherwise. Such a policy discriminates on the basis of pregnancy even when it does not mention pregnancy by name—by extending a benefit to some nonpregnant employees with work limitations but not to pregnant employees with similar limitations, an employer fails to treat pregnant employees "the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

Because petitioner presented direct evidence of sex discrimination, the courts below had no need to resort to the analytical framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), which is used to ferret out hidden motives. But even if the use of that framework had been appropriate, the district court and court of appeals erred in applying it. To establish a prima facie case under *McDonnell Douglas*, a plaintiff must demonstrate, *inter alia*, that she was treated less favorably than a similarly situated employee. The courts below erred in concluding that petitioner was not similarly situated to employees injured on the job because the source of each employee's limitation was different. As noted, Title VII provides that similarly situated employees are those who are similar in their ability or inability to work, without reference to the source of the limitation on their ability or inability to work.

B. The court of appeals' incorrect interpretation of Title VII, as amended by the PDA, undermines the purposes of the statute. Although the court of appeals appeared to understand that the statutory text, taken at face value, requires respondent to offer the same accommodation to pregnant women that it offers to similarly limited nonpregnant employees who sustain on-the-job injuries or lose their DOT certification, the court rejected the unambiguous text because it found that result "anomalous." Pet. App. 21a. The decisions whether to extend antidiscrimination protection to anyone, and to whom or in what circumstances, are quintessentially legislative judgments. Congress understood the vital role that working mothers play in American families and made the policy decision to protect the ability of such women to provide for their families at the very time they are becoming mothers. In addition, Title VII's mandate is limited. It does not require employers to accommodate pregnant women with work limitations in every conceivable circumstance. It merely requires that, when an employer accommodates nonpregnant employees who are similar in their ability or inability to work, it also accommodates pregnant women to the same degree.

C. Finally, the court of appeals' interpretation of Title VII is out of step with that of the EEOC, the federal agency primarily charged with enforcing Title VII. The EEOC recently issued guidance explaining the application of Title VII and the recently amended ADA to pregnant employees. The 2014 guidance is consistent with much earlier EEOC guidance issued closer to the enactment of the PDA. The EEOC has consistently explained that employers are required to offer employment benefits on the same terms to preg-

nant employees and to nonpregnant employees with similar limitations. In the 2014 guidance, the EEOC states explicitly that an employer may not distinguish between pregnant employees and nonpregnant employees based on the source of their limitations, including when the nonpregnant employees' limitations arise from on-the-job injuries. The EEOC's guidance is entitled to respect and reinforces the plain reading of Title VII's text.

ARGUMENT

TITLE VII REQUIRES EMPLOYERS TO TREAT PREGNANT EMPLOYEES WITH WORK LIMITATIONS AS FAVORABLY AS OTHER GROUPS OF NONPREGNANT EMPLOYEES WHO ARE SIMILAR IN THEIR ABILITY OR INABILITY TO WORK

A. The Text Of Title VII Prohibits The Type Of Policy Employed By Respondent

1. In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), this Court held that an employer's policy of excluding pregnancy from its disability-benefits plan did not violate Title VII's prohibition on sex discrimination. *Id.* at 135-140. Two years later, Congress legislatively overruled that interpretation of Title VII when it enacted the PDA. See, *e.g.*, *AT&T* v. *Hulteen*, 556 U.S. 701, 705 (2009); *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 276-277 (1987); *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 678 (1983). The PDA added Subsection (k) to Title VII's "Definitions" provision, 42 U.S.C. 2000e. Subsection (k) provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical

> conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

42 U.S.C. 2000e(k).

The first clause of Subsection (k) prohibits employers from treating any employee less favorably on the basis of pregnancy, childbirth, or related medical conditions—it establishes that any such distinction is discrimination on the basis of sex. By adding pregnancy to the definition of sex discrimination prohibited by Title VII, "the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*." *Guerra*, 479 U.S. at 284-285. The second clause "explains the application of th[at] general principle to women employees," *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678 n.14, by specifying the appropriate comparator for determining whether an employer's differential treatment of an employee is based on pregnancy, childbirth, or a related medical condition (*i.e.*, is based on sex for purposes of Title VII). Congress thus directed that "women affected by pregnancy, childbirth, or related medical conditions" (herein referred to as "pregnant women" or "pregnant employees") "shall be treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k).

A Title VII plaintiff may establish a violation using either direct evidence of discrimination or the burden-

shifting framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), to uncover discriminatory motive. In a case like this one, both approaches boil down to the same question: whether an employer treats pregnant employees with work limitations less favorably than other nonpregnant employees who are similar in their ability or inability to work.

Shifting the focus of the discrimination analysis to an employee's ability to work was one of the principal purposes of the PDA. See, *e.g.*, S. Rep. No. 331, 95th Cong., 1st Sess. 4 (1977) (*Senate Report*) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees."); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4-5 (1978) ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work."). As this Court has explained, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 204-205 (1991) (brackets in original) (quoting *Guerra*, 479 U.S. at 297 (White, J., dissenting)). "[T]his statutory standard," the Court noted, "was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children." *Id.* at 205. Title VII's prohibition on sex discrimination therefore requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all em-

ployment-related purposes.'" *Id.* at 204 (quoting 42 U.S.C. 2000e(k)).

2. a. When, as here, a plaintiff challenges an employer's policy, she can prevail by proving that the policy provides a benefit or accommodation to a class of nonpregnant employees who are limited in their ability to work but does not offer the same benefit or accommodation to pregnant employees with comparable limitations. The court of appeals rejected petitioner's direct-evidence case, reasoning that respondent's temporary-reassignment policy is pregnancy neutral because it does not specifically mention pregnancy. See Pet. App. 18a ("It is certainly true that an explicit policy excluding pregnant workers would violate antidiscrimination law."). That was error. A policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII, as amended by the PDA. Under the statute's definition of discrimination "on the basis of sex" or "because of sex" in Section 2000e(k), a practice or policy discriminates when it treats pregnant employees with work limitations less favorably than other employees with comparable limitations. A policy that provides a benefit *only* to enumerated groups of nonpregnant employees with work limitations discriminates on its face against pregnant women who are similar in their ability or inability to work.

Although the court of appeals acknowledged that the meaning of Section 2000e(k)'s second clause is "unambiguous," Pet. App. 20a (citing *Johnson Controls, Inc.*, 499 U.S. at 204-205), it nevertheless held that the PDA does not prohibit an employer from treating a pregnant employee less favorably than it treats at least some nonpregnant employees who are

similar in their ability to work, *id.* at 20a-24a. Under the court of appeals' logic, as long as an employer does not single out pregnant employees with work limitations for exclusion from a benefit that the employer offers to all other employees with comparable limitations, it does not violate Title VII. That is incorrect.

As discussed, Section 2000e(k) requires that, "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" *Johnson Controls, Inc.*, 499 U.S. at 204 (quoting 42 U.S.C. 2000e(k)). Nothing in the PDA indicates that a pregnant employee faces discrimination within the meaning of Title VII *only* when she receives less favorable treatment than *every* other employee who is similar in his or her ability or inability to work. The plain text of the statute prohibits treating pregnant employees less favorably (for *any* "employment-related purpose[]") than "other persons not so affected but similar in their ability or inability to work." 42 U.S.C. 2000e(k). When an employer offers a benefit to some employees who are limited in their ability to work but not to pregnant employees who are similarly limited, the employer treats those pregnant employees less favorably than "other persons not so affected but similar in their ability or inability to work." Such a policy is facially discriminatory under Title VII, as amended by the PDA. The courts below therefore erred in viewing petitioner's direct evidence of discrimination as insufficient to establish a violation of Title VII.[2]

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[2] The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to

b. Because petitioner presented sufficient direct evidence of sex discrimination to establish a violation, there was no need for the district court and court of appeals to resort to the *McDonnell Douglas* framework to ferret out discriminatory motive. See *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 511 (2002) ("[I]f a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case."); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-122 (1985) (*McDonnell Douglas* test inapplicable where plaintiff presents "direct evidence of discrimination," such as when employer's policy is "discriminatory on its face"). But most courts of appeals have used the *McDonnell Douglas* analysis to evaluate claims such as petitioner's. Those courts (including the court below) have erred in their application of that framework.

In a typical Title VII sex-discrimination case, a female employee may establish a prima facie case under *McDonnell Douglas* by demonstrating that (1) she is a woman, (2) she is qualified for the job or job benefit she seeks, (3) she did not obtain the job or job benefit she seeks, and (4) a similarly situated man did receive the job or job benefit. See *McDonnell Douglas*, 411

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employees with similar limitations caused by on-the-job injuries. See, e.g., *Ensley-Gaines* v. *Runyon*, 100 F.3d 1220, 1222 (6th Cir. 1996). That is no longer the position of the United States. The United States Postal Service continues to offer different treatment to employees with on-the-job injuries than to employees with pregnancy-related limitations and employees with disabilities more generally. In light of the EEOC's new guidance, the enactment of the ADA Amendments Act of 2008, Pub. L. No. 100-325, 122 Stat. 3553, and the pendency of this case, the Postal Service is considering its options with respect to those policies.

U.S. at 802. When a sex-discrimination claim is based on pregnancy, the statute directs that the fourth prong should focus on the relative treatment of nonpregnant employees who are similar in their ability or inability to work instead of on the relative treatment of men. The court of appeals erroneously held that petitioner failed to establish a prima facie case of discrimination because other employees who are eligible for temporary work assignments are not similarly situated to petitioner. Because the source of each employee's limitation is different, the court of appeals reasoned, a pregnant employee with a lifting restriction is not similar in her ability or inability to work as a nonpregnant employee who has an identical lifting restriction as a result of an on-the-job injury. Pet. App. 27a-28a. That is incorrect.

Under the clear language of Title VII, a pregnant employee establishes a prima facie case of pregnancy-based sex discrimination when she identifies a category of nonpregnant employees who are similar in their ability or inability to work and who are treated more favorably. In enacting the PDA, Congress did not distinguish among employees based on the *source* of their work limitations. Congress distinguished among employees based on the work-related *effect* of their work limitations. Title VII does not require employers to treat all employees with similar work-related limitations the same; but, under the PDA, a pregnant employee establishes a prima facie case of discrimination when she establishes that an employer treats pregnant employees with work limitations less favora-

bly than it treats at least one class of nonpregnant employees with similar limitations.[3]

Based on the evidence presented in this case, the court of appeals erred in concluding that petitioner failed to establish a prima facie case under *McDonnell Douglas*. Petitioner identified three categories of employees she viewed as similar to her in their ability to work: employees injured on the job, employees entitled to accommodations under the version of the ADA applicable at the time, and drivers who had temporarily lost their DOT certification and therefore required a non-driving job. Pet. App. 27a. The court of appeals concluded that none of the employees in those categories was similar to petitioner in his or her ability or inability to work. *Id.* at 27a-28a.

As discussed, the court of appeals was wrong with respect to employees with temporary lifting restrictions resulting from on-the-job injuries because the source of the employee's injury is not relevant in determining whether there was differential treatment for purposes of Title VII. See pp. 18-19, *supra*; Pet.

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[3] The court of appeals also repeated its erroneous view (discussed at pp. 15-16, *supra*) that respondent's treatment of pregnant women does not discriminate because some nonpregnant employees are also not entitled to temporary reassignments. Such reasoning has no place in a Title VII case, whether based on allegations of pregnancy discrimination or other forms of discrimination. If a female job applicant alleges discrimination in hiring on the basis of sex, an employer may not defeat that allegation merely by pointing out that some men were also not hired for a particular job. Under the statute's plain text, petitioner's allegation that a group of nonpregnant employees similar in their ability to work was accommodated is sufficient to satisfy the fourth prong of the prima facie case even though other nonpregnant employees similar in their ability to work were not accommodated.

App. 28a ("[Petitioner] is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury."). Both sets of employees are similarly situated with respect to their "ability or inability to work."

The court of appeals also erred in finding no genuine issue of material fact about whether drivers who lose their DOT certifications are similar to petitioner in their ability to work. Pet. App. 27a-28a. Some drivers in that category lose their certification due to injuries (including injuries sustained off the job). See *id.* at 36a. Those drivers may well be similar to petitioner if their injuries impose lifting restrictions. Other drivers may lose their DOT certification as a result of losing their driver's license. *Ibid.* Those drivers may not be similarly situated in their ability to work—although they will require (and respondent will offer them) an "inside job" accommodation, they presumably can take jobs that require heavy lifting. Given the uncertainty about the range of ability to work within that category, the courts below should not have granted (and affirmed the grant of) summary judgment to respondent on the question whether those employees are proper comparators to pregnant employees such as petitioner under a *McDonnell Douglas* analysis.

Whether respondent violated the PDA by accommodating employees under the then-applicable version of the ADA while not extending the same accommodations to pregnant women is a more difficult question. Under the version of the ADA applicable in this case, employees with temporary impairments were generally not considered to be individuals with disabilities under that statute and thus were not entitled to ac-

commodations. See, *e.g.*, *Pollard* v. *High's of Balt., Inc.*, 281 F.3d 462, 468 (4th Cir.) (citing cases), cert. denied, 537 U.S. 827 (2002); but cf. pp. 24-25, *infra* (discussing amendments to the ADA). In some circumstances, individuals with permanent work limitations may require different types of accommodations in order to do their work than individuals with temporary limitations. The Court need not resolve whether the ADA-eligible employees respondent accommodated were similar to pregnant women such as petitioner with respect to their ability or inability to work because, as discussed, the district court plainly erred in granting summary judgment to respondent. In addition, because the ADA now covers individuals with temporary impairments, see pp. 24-25, *infra*, resolution of that question is largely academic going forward.

B. The Court Of Appeals' Interpretation Of Title VII Undermines The Statute's Purposes

The court of appeals refused to follow what it viewed as the "unambiguous" language of Section 2000e(k)'s second clause because doing so, in the court's mind, would have the "anomalous consequence" of treating pregnancy "more favorably than any other basis." Pet. App. 20a-21a. That assessment is mistaken. The PDA requires only that an employer treat pregnant workers "the *same*" as it treats workers who are not pregnant but who are "similar in their ability or inability to work." 42 U.S.C. 2000e(k) (emphasis added). If an employer does not otherwise accommodate employees with work limitations, it need not provide accommodations for pregnant employees. However, Congress has mandated that, when an employer can and does accommodate work limitations for

some nonpregnant employees, it must extend the same accommodations to pregnant employees who are similarly limited in their ability to work. The court of appeals elsewhere recognized that respondent's collective bargaining agreement "places a heightened obligation on [respondent] to accommodate" employees injured on the job. *Id.* at 28a. Title VII places the same "heightened obligation" on respondent to offer the same accommodation to pregnant employees who are similar in their ability or inability to work.

Moreover, the court of appeals misconstrued the legislative history—assuming that history to be relevant here—to the extent it viewed its decision as necessary to avoid a "preferential treatment mandate that Congress neither intended nor enacted." Pet. App. 23a. As this Court has previously noted, the legislative history reflects the views of many legislators that the PDA "in no way requires the institution of any new programs where none currently exist." *Guerra*, 479 U.S. at 287 (internal quotation marks omitted). Petitioner does not seek the introduction of a new program where none currently exists; she instead seeks the extension of an existing program to include pregnant employees. That is exactly what the PDA was designed to accomplish.

This Court has previously rejected arguments that Title VII's prohibition on sex discrimination should be judicially diluted to avoid unfairly burdening certain groups of employees: "[T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful." *City of L.A. Dep't of Water & Power* v. *Manhart*,

435 U.S. 702, 709 (1978). The Court has likewise recognized that an employer's decision to provide benefits to one class of employees may trigger an obligation under the PDA to provide that same benefit to another class of employees, even when the employer's initial decision to withhold the benefit from pregnant employees was made entirely without animus. See, *e.g.*, *Guerra*, 479 U.S. at 290-291; *id.* at 295-296 (Scalia, J., concurring in the judgment). In enacting the unambiguous text of Section 2000e(k), Congress decided that employers must treat pregnant employees with work limitations at least as well as other employees with similar limitations. The court of appeals overstepped its role by ignoring Congress's clear mandate in favor of the court's own policy judgment.

When Congress enacted the PDA, it understood the vital role that working women play in American families and recognized that most women in the workforce "work out of hard economic necessity." *Senate Report* 9. At the time, 70% of working women contributed the only income source or a necessary income source to their families. Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 995 (2013) ("The [Senate] committee cited studies establishing that 70% of working women were divorced, single, or widowed; their families' sole wage earner; or married to men who made less than $7,000 per year, approximately $27,000 in today's dollars."). Families today continue to rely heavily on working women. In 2009, 41% of all births were to single women, who generally have no legal claim to support for their own needs even when they can claim child support. *Id.* at 970. In

married households, working wives contribute an average of 37% of family incomes and earn more than their husbands 38% of the time. *Id.* at 971. Protecting pregnant women from workplace discrimination is therefore vital in safeguarding American families, including the 40% of all households in which the mother is the primary or sole earner. *Ibid.*

Congress has elsewhere implemented its policy judgment that employees with work limitations (including some pregnant employees) should be accommodated where reasonable. Title I of the ADA, 42 U.S.C. 12111 *et seq.*, requires employers to offer reasonable accommodations to employees with disabilities when doing so would not impose an undue hardship. Congress recently enacted the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553, which took effect after the events at issue in this case and does not apply retroactively. § 8, 122 Stat. 3559. The ADAAA (and its implementing regulations) expanded the definition of disability under the ADA to cover a broader scope of impairments, see 29 C.F.R. 1630.2(g) and (j), clarifying that impairments that substantially limit an individual's ability to lift, stand, or bend are disabilities under the ADA, 42 U.S.C. 12102(2)(A); 29 C.F.R. 1630.2(i)(1)(i). These amendments are consequential for pregnant workers with temporary work restrictions in two ways. First, although pregnancy in and of itself does not qualify as a disability, the amended ADA may require employers to accommodate pregnant women who are substantially limited in a major life activity as a result of a pregnancy-related impairment. Second, as amended by the ADAAA, the ADA now requires employers to accommodate at least some employees

with *temporary* restrictions on their ability to lift or stand even when the limitations arise from non-work-related causes. When a pregnant employee satisfies those criteria, she will be entitled to a work reassignment (or other accommodation) under the ADA to the same extent as any other employee with a similar limitation. The similar protection provided to such women by the ADA and Title VII confirms that Congress meant what it said in Section 2000e(k)—that employers must treat pregnant employees with work limitations as well as other employees with similar limitations.

In addition, Title VII does not require employers to accommodate pregnant employees with work limitations in circumstances in which the employer would not accommodate nonpregnant employees with similar limitations. For example, if an employer has a limited number of light-duty jobs available for employees with work limitations, the employer need not offer such an assignment to a pregnant employee if, at the time she requests reassignment, every job is already filled by other employees with work limitations. Because Title VII requires employers to treat pregnant employees "the same" as similarly limited nonpregnant employees, the employer satisfies that mandate by offering work accommodations to pregnant employees on the same terms as it does to any nonpregnant employee. See *EEOC Pregnancy Guidance* Pt. I.C.1.b ("[I]f an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies the same re-

strictions to other workers similar in their ability or inability to work.").

C. The Court Of Appeals' Interpretation Of Title VII Is Inconsistent With That Of The EEOC

Recognizing that petitioner has established a violation of the PDA is consistent with the longstanding position of the EEOC, the agency principally charged with interpreting Title VII. This Court has held that the Commission's reasoned interpretations of Title VII are entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008).

The EEOC published expanded guidance on the application of Title VII and the ADA to pregnant employees in July 2014. EEOC's guidance confirms that "an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits." *EEOC Pregnancy Guidance* Pt. I.A.5; *id.* Pt. I.C. In particular, the recent guidance specifies that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." *Id.* Pt. I.A.5; *id.* Pt. I.C.1.b ("[A]n employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation."). The expanded guidance also explains that "[a] plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp.* v. *Green* in order to

establish a violation of the PDA where there is * * * evidence that a pregnant employee was denied a light duty position provided to other employees who are similar to the pregnant employee in their ability or inability to work." *Id.* Pt. I.C.1.c; *id.* Pt. I.B.1 ("Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.").

The Commission's recent guidance is consistent with its longstanding and reasonable interpretation of the PDA. In 1979, the EEOC published guidance on the PDA in the form of questions and answers. 29 C.F.R. Pt. 1604 App.; 44 Fed. Reg. 23,805-23,809 (Apr. 20, 1979). In response to a question about an employer's duty to accommodate an employee's pregnancy-related inability to perform the functions of her job, the EEOC stated: "An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees." 29 C.F.R. Pt. 1604, App. ¶ 5. The Commission explained that, "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Ibid.* Nothing in those guidelines indicates that an employer's duty to accommodate a temporary restriction is dependent on the employer's offering an accommodation to *every* nonpregnant employee with a similar restriction. See EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* Pt. II.B (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html#pregnancy ("An employer also may not treat a pregnant worker who is

temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy."); EEOC, *Employer Best Practices for Workers with Caregiving Responsibilities*, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last modified Jan. 19, 2011) (listing as a prohibited practice "providing reasonable accommodations for temporary medical conditions but not for pregnancy"). The Commission has also explained in litigation that a pregnant employee is "most appropriately compared to all temporarily-disabled, non-pregnant employees whether they sustained their injuries on or off the job." *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194-1195 (10th Cir. 2000). When enacting the PDA, Congress relied on the Commission's pre-*Gilbert* guidelines, which "specifically required employers to treat disabilities caused or contributed to by pregnancy or related medical conditions as all other temporary disabilities." *Senate Report* 2.

As respondent has pointed out, the EEOC "waived off" the argument "that any distinction between non-work-related conditions and work-related conditions, in a modified duty policy, is per se unlawful" in its appeal in *EEOC* v. *Horizon/CMS Healthcare Corp.*, *supra*. Br. in Opp. 26 n.2 (quoting Resp. of EEOC to Pet. for Reh'g at 12, *Horizon/CMS Healthcare Corp.*, *supra* (No. 98-2328), available at http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (EEOC *Horizon* Resp.)) (internal quotation marks omitted); see Resp. Supp. Br. 10 (same). The Commission explained in that brief, however, that its concession in that case was motivated by its choice to focus on "construct[ing]

a fact-specific argument, rooted in a substantial body of pretext evidence." EEOC *Horizon* Resp. 12. That choice, motivated by a case-specific litigation strategy, did not purport to represent the Commission's authoritative interpretation of Title VII. The EEOC's guidance issued before and after the filing of that brief has consistently supported the conclusion that an employer who offers temporary light-duty assignments to nonpregnant employees with on-the-job injuries but not to pregnant employees with similar work limitations violates Title VII.[4]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MOLLY J. MORAN
Acting Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DENNIS J. DIMSEY
HOLLY A. THOMAS
BONNIE I. ROBIN-VERGEER
Attorneys

P. DAVID LOPEZ
General Counsel
CAROLYN L. WHEELER
Acting Associate General Counsel
JULIE L. GANTZ
Attorney
U.S. Equal Employment Opportunity Commission

SEPTEMBER 2014

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[4] Respondent's further reliance (Br. in Opp. 26 n.2; Resp. Supp. Br. 9) on the EEOC's 1996 guidance on the relationship between workers' compensation laws and the ADA is misplaced. That guidance does not purport to address Title VII or the PDA. See EEOC, *EEOC Enforcement Guidance: Workers' Compensation and the ADA*, http://www.eeoc.gov/policy/docs/workcomp.html (last modified July 6, 2000).

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

—v.—

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND A BETTER BALANCE, *ET AL.*, IN SUPPORT OF PETITIONER

Deborah A. Jeon
American Civil Liberties Union Foundation of Maryland
3600 Clipper Mill Rd,
Suite 350
Baltimore, MD 21211

Dina Bakst
Phoebe Taubman
Elizabeth Gedmark
A Better Balance
80 Maiden Lane, Suite 606
New York, NY 10038

Lenora M. Lapidus
Counsel of Record
Steven R. Shapiro
Ariela M. Migdal
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
llapidus@aclu.org

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Maryland is one of its regional affiliates. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, including pregnancy discrimination. The ACLU has appeared before this Court in numerous cases involving women's equality, both as direct counsel and as *amicus curiae*.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, and public education, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in advancing the rights of pregnant women in the workplace. The organization runs a legal clinic in which the discriminatory treatment of pregnant women can be seen firsthand.

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[1] The parties have lodged blanket letters of consent to the filing of *amicus* briefs in this case. No party has written this brief in whole or in part, and no one other than the *amici curiae*, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. 9to5's members and constituents are directly affected by workplace discrimination, including pregnancy discrimination and poverty, among other issues. They experience first-hand the long-term negative effects of discrimination on economic well-being, and the difficulties of seeking and achieving redress. 9to5's toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

The Center for WorkLife Law (WLL) at the University of California Hastings College of the Law is a national research and advocacy organization widely recognized as a thought leader on the accommodation of pregnant workers. WLL is known for its pioneering work in the area of family responsibilities discrimination and work/family conflict, and works with employers, employees, and lawyers representing both constituencies. One of WLL's most significant, ongoing projects is the Pregnancy Accommodation Working Group. This group, composed of legal scholars, leading employment litigators, and physicians, analyzes pregnancy accommodation in the workplace and the use of existing laws to obtain accommodations. WLL

has advocated for the use of the Pregnancy Discrimination Act to obtain accommodations for pregnant women who are similar in their ability to work to employees who have been accommodated pursuant to workplace injury policies, collective bargaining agreements, the Americans with Disabilities Act, and the like, which is directly at issue in this case.

Gender Justice is a non-profit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools, and the public better understand the roles that cognitive bias and unconscious stereotyping play in perpetuating discrimination, and what can be done to limit their harmful effects and ensure equality of opportunity for all. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including providing direct representation of pregnant employees facing discrimination in the workplace. Gender Justice also participates as *amicus curiae* in cases that have an impact in the region. The organization has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978.

Legal Aid Society – Employment Law Center (Legal Aid) is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, Legal Aid has represented low-wage clients in cases involving a broad range of employment-related issues, including

discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has appeared before this Court in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an *amicus curiae* capacity. *See, e.g.*, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), *U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Legal Aid has extensive policy experience advocating for the employment rights of pregnant women and new parents. Legal Aid has a strong interest in ensuring that pregnant women are granted the full protections of the Pregnancy Discrimination Act and other anti-discrimination laws.

The National Consumers League (NCL) is America's oldest consumer and labor organization, representing consumers and workers on workplace and marketplace issues since our founding in 1899. The issues raised in this brief are very close to NCL's mission and history. Under the direction of its first general secretary, Florence Kelley, NCL wrote and championed state minimum wage laws, got enacted the first state laws restricting child labor, and exposed scandalous working conditions for all workers, including minorities. NCL has advocated for women in the workforce since our founding. NCL

believes that vigorous enforcement of discrimination laws and other workplace employment laws is of paramount importance, especially for the millions of working women who rely on the laws to deter and remedy illegal employment discrimination.

The Southwest Women's Law Center is a legal and policy law center whose mission is to advance opportunities for girls and women in New Mexico. We collaborate with community members, organizations, attorneys, health care providers and public officials to address pregnancy fairness and accommodations for women in the workplace. We advocate for pregnant workers to ensure they are treated fairly and given accommodations when needed, and we advocate against employment practices that force pregnant workers to leave their places of employment causing them to suffer adverse economic consequences because of the loss of means to support their families.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici adopt the Statement of the case contained in the Brief for Petitioner.

Congress enacted the Pregnancy Discrimination Act of 1978 (PDA), Pub. L. No. 95-555, § 1, 92 Stat. 2076, codified at 42 U.S.C. § 2000e(k), to put an end to widespread practices of discrimination against women because of pregnancy. Women were routinely forced to leave the workforce when they became pregnant, with the result that women were subject, as a class, to economic disadvantages and to exclusion from the public sphere more broadly once they became mothers.

Such policies rested (and still rest) on paternalistic assumptions and outmoded stereotypes that have always been used to justify sex discrimination. To remedy this systemic discrimination, the PDA requires an employer to provide the same accommodation to pregnant workers as the employer gives to workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This comparative remedy was necessary to address the class-based mistreatment to which women were uniquely subjected.

Policies, like Respondent's, that push pregnant workers out of the workplace when they need an accommodation that other workers receive perpetuate women's second-class status in the workforce and in society more broadly. When women are forced to leave the workplace because of pregnancy-related conditions, while other workers with similar limitations are provided light duty, women suffer the very discrimination that Congress sought to eradicate. They lose income, economic security, and benefits, including health insurance, often with devastating results. These are precisely the consequences Congress sought to avert with the passage of the PDA more than thirty-five years ago.

ARGUMENT

I. RESPONDENT'S REFUSAL TO PROVIDE PETITIONER WITH THE SAME ACCOMMODATIONS THAT OTHER UPS WORKERS RECEIVE UNDERMINES THE CENTRAL PURPOSE OF THE PDA TO ENSURE THAT WOMEN ARE NO LONGER SYSTEMATICALLY EXCLUDED FROM THE WORKFORCE BECAUSE OF THEIR PREGNANCIES.

Prior to the PDA's enactment, laws and workplace policies often forced women to stop working when they became pregnant, regardless of their capacity to work. Such policies relegated women to second-class status in the workplace and to economic disadvantage over the long term. Congress enacted the PDA to enable pregnant women to participate on an equal footing in the labor force. It did so by ensuring that pregnant women would not be treated worse than other workers who are similar in their ability or inability to work. By denying pregnant workers who are temporarily unable to perform their regularly assigned duties an accommodation that is available to other workers at UPS, the policy at issue in this case pushes pregnant women out of the workforce, undermining the purpose of the PDA and perpetuating the inequality the statute meant to address.

A. Congress Enacted The PDA To Eradicate Widespread Practices Requiring Women Who Became Pregnant To Leave The Workforce.

Congress enacted the PDA to end longstanding practices by which employers forced women out of the workplace as a matter of course when they became pregnant. These practices were based on the notions that pregnancy is incompatible with work, that a pregnant woman's proper place was at home, and that pregnancy should signal the end of a woman's working life. *See, e.g.*, 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams) (PDA intended to address "the outdated notion that women are only supplemental or temporary workers-earning 'pin money' or waiting to return home to raise children full-time"). These stereotypes implicated all women and emanated from the belief that women are, "and should remain, 'the center of home and family life.'" *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729 (2003) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

A web of employer policies and laws defined pregnant women as incapable of working. Women were pushed out of a broad range of professions upon becoming pregnant, including the airline industry, *see Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1137 (4th Cir. 1980) (requiring that stewardesses "shall, upon knowledge of pregnancy, discontinue flying"); *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670, 673 (9th Cir. 1980) (same); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 363 (4th Cir. 1980) (same); teaching, *see Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (forcing

pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1086-87 (5th Cir. 1981) (placing teachers on leave in the beginning of the sixth month of their pregnancy); insurance, *see Wetzel v. Liberty Mut. Ins. Co.*, 372 F. Supp. 1146, 1155 (W.D. Pa. 1974) (requiring pregnant women either to "terminate employment or to take a leave of absence at the end of the eighth month"); utilities, *see Narragansett Elec. Co. v. R. I. Comm'n for Human Rights*, 374 A.2d 1022, 1023 (R.I. 1977) (requiring pregnant women to take leave after the fifth month of pregnancy); and the auto industry, *see EEOC v. Chrysler Corp.*, 683 F.2d 146, 147 (6th Cir. 1982) (requiring pregnant women to take leave in the fifth month of pregnancy).

When forced out of their jobs because of their pregnancies, women frequently lost benefits, including paid sick leave, medical insurance coverage, and accrual of seniority. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 127 (1977); *Harriss*, 649 F.2d at 673. Some workers also lost seniority when they sought pregnancy-related accommodations, such as transfers to ground positions. *See Burwell*, 633 F.2d at 363 (pregnant flight attendants lost all accumulated seniority if they transferred to ground positions). These policies thereby denied women the ability to maintain stable employment and progress in their careers, and resulted in broad-based gender inequality in the workplace and beyond.

Congress adopted the PDA to repudiate this discriminatory regime and thus promote equal opportunity and economic security for women. *See*

Cal. Fed. Savs. & Loan Ass'n, 479 U.S. at 289 (quoting 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams)) ("The entire thrust... behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."). Lawmakers recognized that "discrimination against pregnant women is one of the chief ways in which women's careers have been impeded and women employees treated like second-class employees," and they set out to change that state of affairs. 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins). They sought legislation that would permit millions of "working American women to assume their rightful place, and make a full contribution in our Nation's economy." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

The PDA amends Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex (among other categories). The amended statute states:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

Thus, the PDA does two things. The first clause clarifies that the statute's prohibition on discrimination "because of sex" includes discrimination because of pregnancy. As one of the bill's cosponsor's noted, "since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women." 123 Cong. Rec. 10,581 (1977) (statement of Rep. Hawkins). And the second clause requires employers to treat pregnant employees "the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). This provision requires employers to treat "disability based on pregnancy... as any other disability," so that pregnant women are not worse off simply because of their sex-based characteristic. 123 Cong. Rec. 29,641 (1977) (statement of Sen. Birch Bayh).

Nothing in the PDA refers to the reason for an employee's disability or suggests that it has any significance. The only relevant comparison under the statute is between pregnant employees and other employees "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). In other words, as one of the co-sponsors noted, "[i]f an employer permits other employees to continue working unless their doctors regard them as physically unable to work, it may not force pregnant women off the job, as many employers have done in the past," and "may not deprive women of seniority" for pregnancy-related absences. 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins).

B. Respondent's Policy Of Accommodating Some Workers, But Not Pregnant Women, Contravenes The PDA's Purpose Of Leveling The Playing Field And Eliminating Gender-Based Inequality.

As set forth in Petitioner's brief, the text and structure of the PDA require that the decision below be reversed. Pet. Br. 18-30. The statute's purpose of eradicating the historical discrimination described above supports this conclusion as well.

It is undisputed that UPS provides temporary accommodations, including light duty, to certain workers – those who are injured on the job, those who have impairments cognizable under the Americans with Disabilities Act (ADA), Pub. L. 101–336, 104 Stat. 327 (1990), codified at 42 U.S.C. § 12102, and those who have lost their Department of Transportation certification. Pet. App. 4a. It nonetheless denied Petitioner's request for a similar, temporary accommodation, notwithstanding the PDA's unequivocal directive that pregnant workers "shall be treated the same as other workers not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k).

Respondent's purported justification for this disregard of the statutory command is that UPS does not provide accommodations to workers whose injuries arise off the job and who do not qualify for coverage under the ADA.[2] Respondent contends that

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[2] Because recent amendments to the ADA expanded the pool of employees covered by that statute, including many more workers with temporary disabilities, almost no workers will remain in this category. ADA Amendments Act of 2008, Pub. L.

it is those who do not receive an accommodation under its policy, rather than those who do, who provide the relevant comparison group for PDA purposes.

That approach, however, turns the PDA on its head. The PDA was not designed to address the problem of individual workers who are injured off the job, whether they are male or female. It was designed to address the problem faced by women as a class when they are forced out of their jobs due to pregnancy. The only way to eradicate that gender-based discrimination is to ensure that pregnant women as a group are offered the same workplace accommodations offered to other employees. Having chosen to offer some of its employees a workplace accommodation due to their inability to work, whatever the cause of that inability may be, the PDA prohibits UPS from denying the same accommodation to Peggy Young and other pregnant workers.

Congress adopted the PDA because it was uniquely concerned with the systemic discrimination and economic disadvantage that women suffered as a class because the majority of women – and only women – become pregnant during their working lives. S. Rep. No. 95-331 (hereinafter, "Senate Report"), at 2-3, 9 (1977). And Congress understood that without a statute outlawing the systemic exclusion of workers who become pregnant, women would continue, "because of their capacity to become

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No. 110-325, 122 Stat. 3553. *See generally amicus* briefs filed by Law Professors and Women's and Civil Rights Organizations, and by the Leadership Conference on Civil and Human Rights.

pregnant," to be treated "as marginal workers not deserving the full benefits of compensation and advancement granted to other workers." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams).

Congress recognized the harm to women's equality, as well as to families, when women are pushed out of the workforce. Legislators emphasized the "unjust and severe economic [and] social ... consequences" that "countless women and their families" had to "suffer" as a result of being "forced to take leave without pay" when temporarily "disabled by pregnancy and childbirth." 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams). These "devastating effect[s]" included "loss of income," impairing the ability of families with working mothers "to provide their children with proper nutrition and healthcare," "dissipating family savings and security and being forced to go on welfare." *Id.* Members of Congress were concerned about women having to "forfeit the income which holds their family together" and having to shoulder "the dual cost of being forced to pay their medical costs plus losing their wages." 123 Cong. Rec. 7,541 (1977) (statement of Sen. Brooke).

These harms can only be addressed if, as Congress intended, women are accommodated when employers accommodate any other class of temporarily injured workers. To do so is not to afford pregnant workers "most favored nation" status, as the Fourth Circuit held, Pet. App. 19a, but rather to end the second-class status suffered by women who, by virtue of their sex, experience pregnancy. Comparisons to people who injure themselves lifting, *id.* at 22a, or engaging in other activities outside of

work, are inapt. This group, unlike women, is not subject to systemic, class-wide economic discrimination. That is precisely why Congress built into the comparative scheme a requirement that pregnant women be treated *as well as* others with similar abilities who receive benefits, even if the result is that the employer treats some other workers (also with similar abilities) worse, such as those who incur off-the-job injuries.

The effect of the decision below is to reinforce, rather than eliminate, the inequality at which the PDA takes aim. Indeed, as detailed below, the perverse result of decisions like the Fourth Circuit's is to return pregnant workers in some workplaces to their pre-PDA position at the bottom of the ladder and to ensure that the unfair treatment Congress sought to eradicate three and a half decades ago will continue.

II. EMPLOYER POLICIES AND PRACTICES THAT FORCE PREGNANT WORKERS OUT OF THE WORKFORCE SUBVERT CONGRESSIONAL INTENT BY PERPETUATING THE GENDER-BASED INEQUALITY THAT THE PDA WAS WRITTEN TO ELIMINATE.

When Congress enacted the PDA, it focused on the facts that a large and growing percentage of American women worked outside the home and that a substantial majority of American women became mothers in the course of their working lives. 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). It sought to eliminate practices whereby pregnancy disadvantaged women by ending or

interrupting their ability to make a living and provide for their families. *Id.* Yet, despite that clear legislative intent, employer policies and practices remain in place that result in pregnant women, as a class, being pushed out of the workforce because they are denied accommodations that other workers receive. The result is that women, because of their unique ability to become pregnant, continue to suffer the class-based economic penalties in the workforce that Congress sought to eradicate.

A. The Hardships Suffered By Petitioner In This Case Are Shared By Many Other Pregnant Women Who Are Forced Out Of The Workplace.

What happened to Petitioner Peggy Young happens to many other women. By the time she was forced to stop working because of her pregnancy, she had already exhausted her paid medical leave and was compelled to go on unpaid leave. Pet. App. 43a. In addition to losing pay, she also lost benefits and, for the last six and a half months of her pregnancy, had to go without the health insurance UPS had previously provided. *Id.* Young could not even rely on short-term disability benefits during this period of unexpected income loss. She was told she did not qualify "because [her] doctor didn't give [her] a note saying that [she] couldn't work, that [she] just had a lifting restriction." Pet. App. 41a (alteration in original). Young thus faced the cruel bind of being neither permitted to work, nor to collect the benefits normally available to those who temporarily cannot work.

The financial and other harms Petitioner suffered are sadly typical of those faced by many other women who are pushed out of their jobs, whether permanently or temporarily, by virtue of being denied workplace accommodations that other workers receive. Some of these women's stories have been documented in recent years in court cases like Petitioner's, in testimony before Congress, and in a report co-authored by *amicus* A Better Balance along with the National Women's Law Center. Nat'l Women's Law Ctr., *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* 6 (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (hereinafter *Heavy Lift* report). Those stories help provide context for this case by illustrating the ways in which women who are denied accommodations during pregnancy continue to suffer the ills that motivated Congress to pass the PDA in the first place.

Appearing before Congress earlier this year, Armanda Legros testified that she was sent home by her manager at an armored truck company, indefinitely and without pay, when she was six and a half months pregnant and had to avoid heavy lifting. She also testified that a co-worker who injured his back on the job was granted the accommodation that she was denied. Legros described her struggle as a single mother with no other source of income. "Once my baby arrived, just putting food on the table for him and my four-year-old was a challenge. I was forced to use water in his cereal at times because I could not afford milk. I was scared every time I looked in my empty fridge." *Economic Security for Working Women: Hearing Before the S. Comm. On Health, Educ., Labor & Pensions*, 113th Cong. (2014)

(statement of Armanda Legros, Low-wage worker), *available at* http://www.help.senate.gov/imo/media/doc/Legros2.pdf. Legros lost her job, fell behind on rent payments, and nearly lost her apartment. "Even when I applied for emergency rental assistance, I didn't qualify because I didn't have any income coming in." *Id.* Ultimately, Legros had to turn to public benefits, applying for Medicaid for her own prenatal care and for her children. *Id.*

Natasha Jackson, whose story is documented in the *Heavy Lift* report, illustrates how denial of accommodations can send women in seemingly secure careers into a spiral of financial insecurity. Jackson reported that she saw her dream of home ownership unravel after being denied accommodations while pregnant. Jackson was the highest-ranking account executive and the only female employee at a Rent-A-Center in South Carolina. When she needed to avoid occasional heavy lifting required of her job, she was pushed onto leave. Coworkers with on-the-job injuries, in contrast, received accommodations, according to Jackson. "The timing could not have been worse. My husband and I had just made a down payment on a house... Without my income, we were forced to back out of the contract." Jackson ultimately lost her job. *Heavy Lift* report, *supra*, at 6.

As in Petitioner's case, the combination of being forced to go on leave when they are pregnant and having to use up whatever paid sick leave their jobs provide often results in women having to go without income for extended periods. Women who are not accommodated while pregnant must exhaust all of the paid leave that they planned to use after

giving birth. Diana Teigland, a letter carrier for the United States Postal Service for nine years, reported being forced to use paid sick days and other leave after her doctor placed her on a heat restriction while pregnant. "As a result, I didn't have any paid leave left when my baby was born. I was the primary breadwinner in the family, but during my maternity leave, it was all on my husband's shoulders. Going without my salary right when I had the added expense of a new baby was very difficult for me and my family." *Heavy Lift* report, *supra*, at 10.

Women who are forced to use up their *unpaid* leave (Family and Medical Leave Act of 1993 (FMLA)[3] leave) – including women whose employers do not provide any paid sick days – may lose their jobs altogether. While Peggy Young did not suffer this consequence, it is a predictable outgrowth of employer policies, like UPS's, that systematically deny accommodations to workers who become pregnant. For example, Amy Crosby, who is featured in the *Heavy Lift* report, described being denied accommodation of her lifting restriction by the hospital where she worked, although she reported that the hospital accommodated workers with disabilities and on-the-job injuries. "Because of my lifting restriction, the hospital placed me on 12 weeks of unpaid FMLA leave, which would run out a month and a half before my due date. The hospital told me I would not be permitted to return to work until I had no restrictions and that it would consider me to have

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[3] The FMLA allows certain employees to take twelve weeks per year of unpaid, job-protected leave for reasons including the birth of a child and a serious health condition, including pregnancy, that make the employee unable to perform essential functions of her job. *See* 29 U.S.C. § 2612(a)(1).

'voluntarily resigned' if I failed to return to work without restrictions the day after my 12 weeks of leave expired, in the middle of my last trimester." *Heavy Lift* report, *supra*, at 8.

Even women who qualify for disability insurance – unlike Petitioner Peggy Young – may be forced to use up those benefits before the baby arrives. Yvette Nunez, another woman whose story is documented in the *Heavy Lift* report, worked at a New York City grocery store for eleven years. When she sought an accommodation to avoid endangering her high-risk pregnancy, she was fired. After being fired, her union helped her obtain disability benefits, but her 26 weeks of disability payments ran out one month before her due date, forcing her onto unpaid leave just as her household expenses were rising. *Heavy Lift* report, *supra*, at 11. When she lost her job, Nunez also lost her health insurance. She had to resort to Medicaid and other public benefits. "My family and I survived on food stamps and my savings. When I finally returned to work three months after giving birth, I had no savings left." *Heavy Lift* report, *supra*, at 11.

Women who are forced out of the workplace when pregnant also forfeit other earned long-term benefits, including 401K contributions, short-term disability benefits, seniority, pension, social security contributions, and other benefits. *See, e.g., Orr v. Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement). Systemically depriving women workers of these short- and long-

term job benefits when they become pregnant contributes to women's economic inequality over the long run.

B. Congress Was Concerned About The Financial Hardships Suffered By Women Who Are Deprived Of Income And Benefits When Forced Out Of The Workforce During Pregnancy.

The economic concerns of pregnant women and their families, such as those described above, were expressly addressed by Congress when it enacted the PDA. Congress discussed the need to ensure women's "financial security, and the security of their families." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Members of Congress focused on the financial vulnerability of low-income women when excluded from the workforce while pregnant. *See Introduction of Pregnancy Disability Legislation, Extension of Remarks on H.R. 5055 in the House of Representatives*, 95th Cong. (1977) (opening statement by Rep. Hawkins), cited in *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F.2d 1469, 1473 *vacated sub nom. EEOC v. Joslyn Mfg. & Supply Co.*, 724 F.2d 52 (7th Cir. 1983) (stating that exclusion of pregnant workers from benefits and other workplace protections would have "a particularly severe impact on low-income workers who may be forced to go on leave without pay for childbirth or pregnancy related disabilities"). Legislators were especially concerned about the effect of "loss of income" on workers, "especially low-income women," and sought to eliminate situations in which they had to use up savings and even "go on welfare." 123 Cong. Rec. 7,539 (1977) (statement of Sen. Williams).

Congress also recognized that income is not the only resource depleted by forced exit from work. Legislators focused on the discrimination women suffered when they were denied workplace benefits because of pregnancy, specifically including paid leave and health insurance benefits. *See* Senate Report at 2-4. Thus, Senator Williams highlighted "the loss or reduction of vacation and sick leave benefits" that pregnant women suffered when pushed out of the workforce. 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Similarly, Senator DeConcini focused on the "loss of income and [its impact on] many [pregnant] women and their families" if excluded from health insurance benefits. *Discrimination on the Basis of Pregnancy: Hearings Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 168 (1977). Indeed, the exclusion of pregnant women from health benefits related to pregnancy was the immediate impetus for the statute's passage. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983).

Finally, in enacting the PDA, Congress expressly sought to eradicate policies that deprived pregnant workers of their seniority, pension credits, and other long-term benefits when they were forced onto unpaid leave. Pre-PDA employer policies often forced pregnant women off the job, and then treated them "as a new employee" who "started at the bottom of the seniority ladder" and lost "earned pension credit." 123 Cong. Rec. 10,582 (1977) (statement of Rep. Hawkins). Lawmakers recognized that loss of seniority, as well as loss of service credit toward a pension, "had a lifetime impact" on pregnant

workers' pay and benefits, and sought to end this disadvantage. *Id.*

C. The Concerns That Prompted Passage Of The PDA, Including Women's Economic Inequality, Persist Today.

Unfortunately, the concerns that prompted Congress to act in 1978 remain all too real for today's women, more of whom are now working than ever before. Half of all U.S. workers are women. Maria Shriver, Center for American Progress, *The Shriver Report: A Woman's Nation Changes Everything*, Exec. Summ. 17 (2009), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf. Seventy-five percent of women will become pregnant during their working lives. Alexandra Cawthorne & Melissa Alpert, *Labor Pains: Improving Employment and Economic Security for Pregnant Women and New Mothers*, Parenting with Dignity, Center for American Progress (Aug. 3, 2009), http://www.americanprogress.org/issues/women/report/2009/08/03/6599/labor-pains/.

Women's income – before, during, and after pregnancy – is critical to their families' well-being, and the loss of that income imperils their family's financial security. Most families rely on women for critical household income and depend on that money to keep the family afloat when welcoming a new baby. Approximately half of middle-income working wives are breadwinners. Sarah Jane Glynn, *The New Breadwinners: 2010 Update, Center for American Progress*, 3 (April 2012), http://cdn.americanprogress.org/wp-content/uploads/issues/

2012/04/pdf/breadwinners.pdf. Nearly 64% of mothers with children under the age of six work. Bureau of Labor Statistics, U.S. Department of Labor, *Employment Characteristics of Families 2013*. Economic News Release, 2 (last modified April 25, 2014), http://www.bls.gov/news.release/pdf/famee.pdf. And "[i]n 2010 in nearly two-thirds (63.9%) of families with children women were either breadwinners or co-breadwinners." Glynn, *supra*, at 2.

Women's income is especially critical to the well-being of low-income and single-mother headed families, which rely disproportionately on mothers' earned income and have little cushion for emergencies. *See generally* Stephanie Bornstein, *Poor Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (2011), Ctr. For WorkLife Law, *available at* http://www.worklifelaw.org/pubs/PoorPregnantAndFired.pdf. In families in the bottom fifth of income distribution, 70% of working wives earn as much or more than their husbands. Glynn, *supra*, at 3.

In part for that reason, many women who become pregnant work long into their pregnancies. From 2006 to 2008, 81% of women who became pregnant while employed continued to work until one month or less before the birth of their first child, up from 34% in the period from 1961 to 1965. Lydia Laughlin, *Maternity Leave and Employment Patterns of First-Time Mothers, 1961-2008*, Household Economic Studies, Special Studies, Current Population Reports, U.S. Census Bureau 7, table 3 (Oct. 2011), http://www.census.gov/prod/2011pubs/ p70-128.pdf.

Policies that force women to leave the workforce when they are pregnant cut off vital income to families. *See* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U. Cal. Davis L. Rev. 961, 970-78 (2013). They also contribute to persistent inequality in the wages earned by mothers who return to work after the birth of their child. *See generally* Michelle J. Budig, *The Fatherhood Bonus & the Motherhood Penalty: Parenthood and the Gender Gap in Pay*, Third Way NEXT 7-8, 13-17 (2014) (describing the negative effects of having children on women's wages, particularly low-wage women), *available at* http://www.thirdway.org/publications/853. This motherhood wage gap is significant. High-wage mothers earn an average of 4% less per child than non-mothers. For low-income women, the price is especially steep: each new child brings a pay penalty of 15%. *New Evidence on the Gender Pay Gap for Women and Mothers in Management: Hearing Before the U.S. Cong. Joint Econ. Comm.*, 111th Cong. 4-5 (Sept. 28, 2010) (statement of Michelle Budig, Associate Professor of Sociology, University of Massachusetts), *available at* http://www.jec.senate.gov/public//index.cfm?a=Files.Serve&File_id=3d4b47cf-4afb-4e53-a550-164b4b593266. Fathers do not pay the same price for having children: "While the wages of young women without children are close to those of men, mothers' wages are only 60% of those of fathers." Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 Harv. Women's L.J. 77, 77-78 (2003).

Breaks in workforce participation that are not accompanied by additional schooling are the single greatest contributor to the motherhood wage penalty. Jeremy Staff & Jeylan T. Mortimer, *Explaining the Motherhood Wage Penalty During the Early Occupational Career*, 49 Demography 1, 12 (2012). According to one study, women's wages decline by 11% when they accumulate 22 months of no work or school. *Id* at 14. Each time a woman is forced out of her job and spends months looking for work, she adds to her lifetime earnings penalty. Career interruptions – including unwanted ones – and the low-quality jobs they promote, contribute to women's lifetime earning being only 38% of men's. Joan C. Williams, *Keynote Address: Want Gender Equality? Die Childless at Thirty*, 27 Women's Rights. L. Rptr., Winter 2006, at 3, 4.

These financial consequences are further exacerbated by the fact that women pushed out of the workforce because of pregnancy face barriers to re-entering rooted in discrimination against pregnant women and mothers. Despite the PDA's clear prohibition on bias in hiring, securing a job while visibly pregnant remains nearly impossible. Guadalupe Hernandez, for example, another woman whose story is documented in the *Heavy Lift* report, was not able to obtain another job after being pushed out during her pregnancy, stating that "every time I went to a potential employer, they looked at my belly and said 'no.'" *Heavy Lift* report, *supra*, at 4. In a landmark study, participants presented with identical resumes differentiated solely by parental status were nearly twice as likely to recommend childless women over mothers for hire, and recommend a starting salary for mothers 7.4% lower

than that offered to non-mothers. Shelley J. Correll, et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 Am. J. of Soc. 1297, 1316 (March 2007), *available at* http://www.jstor.org/stable/10.1086/ 511799. Participants also judged mothers to be less competent and committed than women without children, whereas fathers were rated significantly more committed to their jobs than non-fathers. *Id.* at 1316-17.

When mothers move in and out of the workforce, whether by choice or compulsion, they not only lose wages and health insurance, but seniority, promotion opportunities, pension and other benefits of continuous employment that promote economic stability for their families. Many cycle through part-time jobs that lack benefits, where employers penalize them with "slower wage growth, lower promotion rates, poorer performance reviews, and worse work assignments relative to workers who work continuously and consistently full time." Julie A. Kmec et al., *Not Ideal: The Association Between Working Anything but Full Time and Perceived Unfair Treatment*, 41 Work and Occupations 63, 64 (2014). They also lose out on future social security benefits, as time without income is averaged into their lifetime earnings. *See* Ctr. for Cmty. Change & Older Women's Econ. Sec. Task Force, *Expanding Social Security Benefits for Financially Vulnerable Populations* 3 (2013) ("In 2012, the average annual Social Security income received by women 65 years and older was $11,999, compared with $16,295 for men.").

The long-term impact of these combined consequences is staggering. Having a child is now

"the single best predictor that a woman will end up in financial collapse." Elizabeth Warren & Amelia Warren Tyagi, *The Two-Income Trap: Why Middle-Class Parents are Going Broke* 6 (2003). One quarter of all poverty spells – periods of at least two months of income below the poverty threshold for a family – result from the birth of a child. Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, Future of Children, Spring/Summer 2001, at 99-100. In the United States, motherhood is the single biggest risk factor for poverty in old age. Ann Crittenden, *The Price of Motherhood: Why The Most Important Job in the World Is Still the Least Valued* 6 (2001).

Employer policies, like Respondent's, that unfairly deny pregnant women accommodations disadvantage women economically and undermine the core purpose of the PDA. They do so by forcing women who are eager and able to work to endure periods of compelled leave without income or benefits or to lose their jobs entirely. Members of Congress recognized that the "shocking statistics" concerning women's economic inequality could not be improved upon "unless working women are provided effective protection against discrimination on the basis of their childbearing capacity." 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams). Interpreting the statute to permit employer policies, like Respondent's, that push women out when pregnant, does not provide the "effective protection" Congress envisioned.

D. Inequality Is Magnified When Women Are Pushed Out Of Jobs From Which They Were Traditionally Excluded.

Policies like Respondent's have the additional result of reinforcing women's historical exclusion from certain sectors where "breadwinner" jobs (those offering stable full-time employment and benefits such as paid leave and health insurance) can be found. Traditionally male-dominated occupations such as package driver and police officer remain closed off in many ways to female employees. Women still made up less than 12% of police officers as of 2007, up from 7.6% in 1987. Bureau of Justice Statistics, DOJ, *Crime Data Brief: Women in Law Enforcement* 1987-2008, at 3 (2010), *available at* http://www.bjs.gov/content/pub/pdf/wle8708.pdf. And women make up only 22.6% of transportation and utilities workers, a sector that includes the postal service, couriers, messengers, and warehouse workers. Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 50 tbl.14 (2013), *available at* http://www.bls.gov/cps/wlf-databook-2012.pdf. Yet these are some of the more financially secure jobs on the market, often affording benefits like insurance and paid vacation and sick time that women working in other sectors do not receive. *See supra*, Part II.A. Many of these occupations entail physically demanding or strenuous activities, which may necessitate accommodations for some women when they are pregnant. *See* Renee Bischoff & Wendy Chavkin, N.Y.C. Dep't of Health & Mental Hygiene & Columbia Univ. Mailman Sch. Of Public Health, *The Relationship Between Work-Family Benefits and Maternal, Infant and Reproductive Health* 5-6 (2008), *available at*

http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf (detailing increased negative health risks of physically strenuous labor during pregnancy).

Women's capacity to break into these fields is greatly compromised when they are denied accommodations afforded to other workers. For example, women in the shipping industry, like Peggy Young, often already face a difficult time in a male-dominated workforce. *See Heavy Lift* report, *supra*, at 15. Policies like that of UPS treat pregnant women as unsuitable for the workplace, when they are as able as men afforded accommodation. They lose rank and seniority, and they sometimes lose their jobs. This pattern reaffirms gender stereotypes and conveys the message that men are meant to do certain types of work, to the exclusion of women workers, or at least the majority of women workers who become pregnant.

In a recent case filed with the EEOC, Florence, Kentucky Police Department patrol officer Lyndi Trischler alleged that she was forced onto unpaid leave at five months pregnant after a new city policy denied any modified duty for non-work related conditions. *See* Brigid Schulte, *Pregnant Women Fight To Keep Jobs Via 'Reasonable Accommodations,'* Wash. Post, Aug. 4, 2014, http://www.washingtonpost.com/national/health-science/pregnant-women-fight-to-keep-jobs-via-reasonable-accommodations/2014/08/04/9eb13654-1408-11e4-8936-26932bcfd6ed_story.html. Because of the heavy weight of her gun belt and the size of her bullet-proof vest, she could no longer physically do her job patrolling the city. She is one of only two female police officers on a staff of around 60.

The city's decision to no longer provide light duty for pregnant workers means that Officer Trischler must use up all of her paid sick days and vacation days to survive and feed her one-year-old daughter. All forms of payment will be exhausted long before her medically-recommended eight weeks of childbirth recovery time are completed. She alleged she was also told by Human Resources that her health benefits would cut off when she stopped receiving a paycheck.

The exclusion of women, and pregnant women in particular, from entire workplace sectors consisting of "breadwinner" jobs undermines Congress's original intent in drafting the PDA. *Discrimination on the Basis of Pregnancy: Hearing on S. 955 Before the S. Comm. On Human Res.*, 95th Cong. 34 (1977) (statement of Alexis M. Herman, Director of Women's Bureau, Department of Labor). Lawmakers were aware that many families relied solely or primarily on mothers' income, *see id.* at 309 (statement of Bella S. Abzug, Presiding Officer, National Commission on the Observance of International Women's Year, Department of State) (noting that "1973 data shows that the husband was the only earner in less than three out of eight husband-wife families"), a phenomenon that has only increased in the years since the PDA's passage.

* * * * * * * * * *

Policies like those challenged in this case directly contradict Congressional intent and recreate for classes of women the 1970's-era world where women were forced out of their jobs because of their pregnancies. This world, in which pregnant women

lose income and benefits while other workers similar in their ability to work are permitted to stay in the labor force, undermines efforts to combat sex discrimination in the workplace. Respondent's policy thus perpetuates women's unequal status and reinforces outdated stereotypes about women's capacities and roles. Congress adopted the PDA precisely to prevent these results.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

Lenora M. Lapidus
Counsel of Record
Steven R. Shapiro
Ariela M. Migdal
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
llapidus@aclu.org

Deborah A. Jeon
American Civil Liberties
Union Foundation of
Maryland
3600 Clipper Mill Rd,
Suite 350
Baltimore, MD 21211

Dina Bakst
Phoebe Taubman
Elizabeth Gedmark
A Better Balance
80 Maiden Lane, Suite 606
New York, NY 10038

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF RESPONDENT

PRASAD SHARMA
RICHARD PIANKA
AMERICAN TRUCKING ASSOCIATIONS, INC.
950 N. Glebe Road
Arlington, VA 22203

THOMAS R. MCCARTHY
Counsel of Record
WILLIAM S. CONSOVOY
CONSOVOY MCCARTHY PLLC
3033 Wilson Blvd.
Suite 700
Arlington, VA 22201
(703) 243-4923
tom@consovoymccarthy.com

Attorneys for Amicus Curiae

October 31, 2014

256213

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICUS CURIAE*

American Trucking Associations, Inc. ("ATA") is the national trade association of America's trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences.[1] ATA was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 2,000 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly represents the common interests of the trucking industry through litigation in courts across the nation, including on numerous occasions before this Court. *See, e.g.*, *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096 (2013); *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011); *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101 (2011).

This case directly impacts the interests of ATA and its members. Many of ATA's members are subject to the Pregnancy Discrimination Act ("PDA"). Petitioner offers a construction of the PDA that transforms a straightforward non-discrimination law into perhaps the most burdensome accommodation statute conceivable. This interpretation of

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* ATA certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

the PDA not only badly misreads the statute, it may force ATA members to violate numerous agreements that they have reached with their employees. Further, compliance would be costly and in many cases impossible as trucking companies often do not have the option of offering women alternative positions during their pregnancy. ATA and its members therefore have a strong interest in ensuring the PDA is interpreted according to its ordinary meaning.

SUMMARY OF ARGUMENT

The PDA made a one-sentence amendment to Title VII by adding "because of or on the basis of pregnancy" to the definition of sex discrimination. As every circuit court has held, a claim for pregnancy discrimination therefore invokes the traditional anti-discrimination protections of Title VII. It is not an independent cause of action requring special accommodation for pregnant women unavailable to similarly situated employees. According to Petitioner, however, the PDA requires the employer to offer pregnant women *any* accommodation offered to *any* other employee with similar restrictions. In other words, Petitioner asks this Court to convert a statute designed to ensure that pregnant women are not singled out for disfavored treatment into a law that affords them "'most favored nation' status." Pet. App. 19a. Petitioner's interpretation is untenable as a matter of basic statutory construction.

But even if this were a close question, which it is not, the practical problems following from Petitioner's view counsel against adopting this sweeping interpretation of the PDA. Adopting Petitioner's version of the PDA would impose substantial new burdens on employers. According "most favored nation" status to pregnant employees would

dissolve the neutral distinctions that employers routinely draw between classes of employees for the purpose of allocating benefits. Refashioning the PDA in the manner Petitioner advances thus would impose on employers substantial new obligations to accommodate pregnant workers. Faced with increased liability, employers may be forced to scale back the accommodations they afford to all workers, providing only the minimum required by law.

Petitioner's expansive interpretation of the PDA would be especially burdensome for ATA's members. By the nature of their business, trucking companies have the ability to offer few, if any, alternate accommodations for those drivers who are unable to perform the job's essential functions. There just are not "light duty" trucker positions. This relative lack of available accommodations makes it a virtual certainty that a ruling in favor of Petitioner would result in trucking companies pulling back sharply on the accommodations they offer, and at a time when the industry is experiencing an unprecedented shortage of drivers.

ARGUMENT

I. The Pregnancy Discrimination Act Is An Anti-Discrimination Amendment To Title VII, Not An Accommodation Law.

The PDA is a simple one-sentence amendment to the "Definitions" section of Title VII. The first clause "add[s] pregnancy to the definition of sex discrimination prohibited by Title VII." *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). The second clause "explains the application of the general principle

to women employees," *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983), by clarifying that "women affected by pregnancy ... shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work." Pub. L. No. 95-555 (amending 42 U.S.C. § 2000e).

The PDA's text, structure, and history all show that it extends Title VII's anti-discrimination prohibition to pregnant employees. *See* Resp. Br. 26-49. The PDA's text outlaws discrimination "because of or on the basis of pregnancy," Pub. L. No. 95-555 (amending 42 U.S.C. § 2000e(k)) just as Title VII bans discrimination "because of an individual's race." *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009). Congress's structural decision to house the PDA within the definitional section of Title VII confirms this understanding. *See Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2529 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). As a matter of history, moreover, the PDA was enacted as corrective legislation in direct response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which this Court held that Title VII's prohibition on sex discrimination did not extend to discrimination on the basis of pregnancy. *See Guerra*, 479 U.S. at 284-85. Accordingly, the PDA ensures that women are not singled out for disfavored treatment because they are pregnant.

Petitioner nevertheless asks the Court to interpret the PDA countertextually to require employers to provide accommodations to pregnant workers "even if still other nonpregnant workers do not receive accommodations." Pet. Br. 28. There can be no doubt, then, that Petitioner seeks

to "radically transform" the PDA from "a discrimination statute into an accommodations statute." Resp. Br. 41. The PDA would cease to be a remedial statute designed to provide make-whole relief to those injured by intentional acts of discrimination; instead, it would become a forward-looking statute affirmatively mandating that employers accommodate pregnant employees on an ongoing basis. *See id.* at 48.

Worse still, Petitioner's refashioned PDA would be no ordinary accommodations law. As Petitioner reads the statute, the PDA would require employers to afford to a pregnant employee *any* accommodation accorded to *any* other employee "similar in their ability or inability to work." *See id.* at 26-27, 45. As a practical matter, such a construction would "imbue the PDA with a preferential treatment mandate," Pet. App. 23a, that would effectively confer upon pregnant employees "most favored nation" status, *id.* at 29a.

Put simply, a pregnant employee would be entitled to any benefit afforded to any class of employee, even if she were not otherwise a member of that class. Employers thus could no longer decline to offer accommodations to pregnant employees based on neutral criteria adopted for the purpose of allocating benefits. Respondent illustrates by example: "if an employer has a policy of granting paid leave for temporary disabilities to only full-time management employees who have been employed for at least 15 years, under petitioner's reading, the employer also must provide this paid leave to every pregnant employee, including brand-new, part-time hourly employees." Resp. Br. 46. As explained below, Petitioner's sweeping interpretation of the PDA would cause serious problems for the trucking industry.

II. Treating The PDA As An Accommodation Provision Would Obliterate Otherwise Lawful Distinctions Between Different Categories Of Employees.

Most businesses have different classes of employees. For many reasons, those different classes often are treated differently by their employer. They may be compensated differently. They may receive different benefits packages. They may be accommodated differently if they are injured or disabled. Thus, a CEO may receive "company provided transportation for a back injury" even though a "mailroom clerk" might not. Resp. Br. 45. Indeed, it is quite rational for companies to make economic distinctions in deciding which classes of employees will be eligible for certain accommodations.

Employers often draw distinctions between classes of employees for other reasons as well. Seniority, union membership, full-time/part-time status, and job type are all taken into consideration when companies structure employee benefits and accommodation rules. And, as a general matter, such distinctions are entirely lawful as they do not "rely on any of the sorts of stereotypical assumptions" regarding a trait protected under the federal discrimination laws. *Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 146 (2008). This is true even if the classifications result in the denial of benefits to employees of protected status, so long as those distinctions are applied on a neutral and even-handed basis. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 54-55 (2003); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12 (1993); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-80 (1977).

This case provides an apt illustration. Pursuant to its collective-bargaining agreement, UPS may assign "temporary alternative work" (TAW) to bargaining unit employees who have a lifting restriction resulting from an on-the-job injury. TAW is light-duty work, generally limited to 30 days as part of a structured rehabilitative program designed to help injured workers restore full functionality so that they can return to heavy-duty work. Resp. Br. 2-3; Pet. App. 3a-4a. It is unavailable to employees with lifting restrictions resulting from off-the-job injuries. When an employee is under a lifting restriction resulting from an off-the-job injury or condition, he or she must take a leave of absence until the restriction is removed. Pet. App. 34a-35a.

When Petitioner advised UPS that her medical providers had placed her under a lifting restriction and requested a light-duty reassignment, UPS granted her leave instead. Petitioner thus was treated *exactly the same* as the class of employees of which she is a member—those with a lifting restriction resulting from an off-the-job injury or condition. Resp. Br. 30. Given that UPS had applied its policy evenhandedly, Petitioner resorted to attacking the distinction UPS draws between employees who have suffered on-the-job injuries and those who have not. She construes the PDA to negate this distinction and require UPS to afford her a light-duty accommodation because UPS affords the same to employees with heavy-lifting restrictions resulting from on-the-job injuries, even though her "restrictions ar[o]se from her (off-the-job) pregnancy." Pet. App. 22a.

But the line UPS drew here is not of recent vintage. Employers routinely treat differently those employees who

are injured on the job and those who are not. This "long-standing neutral criterion ... has been the centerpiece of worker's compensation law since the early 20th century." Resp. Br. 45 (citing *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 196 (1917)). Petitioner's reading of the PDA would dissolve this distinction, undermining the ability of employers to invoke it as a legitimate, neutral basis for allocating accommodations. That cannot be right. As the Fourth Circuit explained, "[t]he CBA provision requiring UPS to accommodate those employees injured while carrying out job duties for the company but not while pursuing other activities reasonably places a heightened obligation on UPS to accommodate the former group. The PDA does not render this distinction unlawful." Pet. App. 28a.

Worse still, Petitioner's reasoning extends far beyond the desire for a light-duty accommodation while pregnant. Rather, she makes the remarkable claim that when an employer offers an accommodation to "a[ny] group of workers who are 'similar in their ability or inability to work,' pregnant workers must 'be treated the same.'" Pet. Br. 29 (quoting 42 U.S.C. § 2000e(k)); *see also* Pet. Br. 28. Her version of the PDA thus would entitle a pregnant employee to the benefit of *any* accommodation accorded to *any* other employee with the same work restriction. In other words, Petitioner's interpretation would convert the PDA into a "most favored nation" mandate for pregnant employees, Resp. Br. 13, 49, thus "imbu[ing] the PDA with a preferential treatment mandate that Congress neither intended or enacted," Pet. App. 23a.

Recasting the PDA as a super-accommodation law is not only legally unsustainable, it is counter-productive.

Such a regime would impose on employers expansive new obligations to accommodate pregnant workers. Any accommodation offered to any employee from any job class would need to be afforded to a pregnant worker with similar physical restrictions. This all-or-nothing approach could force employers to scale back the accommodations they offer to workers with seniority, for example, because they are not in a position to extend that accommodation more broadly. Faced with such increasing liability, employers may be forced to offer employees only those accommodations required by law.

Yet Petitioner seems comfortable with that result. She notes that her PDA claim—under her unsustainable legal theory—arose because of "the employer's decision to accommodate only a subset of workers in the first place" and she emphasizes that the "employer is free to accommodate *none* of its workers." Pet. 28-29. The Court should not find this comforting. Congress did not enact the PDA to deny employers the ability to accommodate workers with seniority differently than those who have been on the job two weeks. Congress enacted the PDA to ensure that women are not discriminated against because they are pregnant. Its purpose was to ensure equal treatment by requiring employers *to raise the bar for pregnant workers, not to lower the bar for everyone else.* The PDA should serve its purpose. Giving the law its natural interpretation would accomplish that goal.

III. Trucking Companies Are Constrained In Their Ability To Accommodate Employees, Including Pregnant Workers, Who Cannot Fulfill The Essential Functions Of The Job.

Construing the PDA to require employers to provide to pregnant employees any accommodation received by any other employee with similar work restrictions would be particularly burdensome for trucking companies. The nature of the trucking business leaves them with few means for accommodating employees with pregnancy-related physical restrictions. The Court should hesitate before adopting a construction of the law that would place this important industry in an untenable position.

"The quintessential function" of being a truck driver "is to be able to drive a commercial truck in interstate commerce." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 579 (1999) (Thomas, J., concurring). But the job carries other responsibilities too. One of those responsibilities is heavy lifting, *i.e.*, loading and unloading payloads. It is an "essential function" of the position. *See, e.g., Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638 (6th Cir. 2006) (commercial truck driver required to lift 75 pounds and use a dolly to push or pull freight weighing up to 200 pounds); *St. Laurent v. United Parcel Service, Inc.*, 416 F. Supp. 2d. 212, 215 (D. Mass. 2006) (commercial truck driver required to lift as much as 70 pounds). And, most non-driving positions at trucking companies similarly require heavy-duty work. *See, e.g., Herrera v. CTS Corp.*, 183 F. Supp. 2d 921, 927-28 (S.D. Tex. 2002) (essential function of shipping clerk position is to lift packages over 40 pounds and up to 90 pounds); *Collins v. Yellow Freight Sys., Inc.*, 942 F. Supp. 449, 450 (W.D. Mo. 1996) (road "hostler" job requiring movement of 1,000-pound dollies).

This case proves the point. The record demonstrates that for UPS drivers, like other truck drivers, the ability to lift packages weighing up to 70 pounds is an essential function of their job. Pet. App. 3a, 31a-32a. The record demonstrates that non-driving "inside" jobs are not, as Petitioner suggests, "light duty" jobs; "inside jobs" typically involve heavy-duty work at a UPS facility in positions as loaders, unloaders, and sorters. J.A. 261. Naturally, these jobs involve the very same heavy-lifting requirements as UPS drivers. Pet. App. 32a. To be sure, some particular "inside" *tasks* do not require heavy lifting, but, as Respondent explains, "any employee afforded an 'inside' job accommodation must be physically able to perform all the essential functions of that position, often moving between tasks that do and do not include heavy lifting." Resp. Br. 4 (citing J.A. 269-70, 274, 281). Employees with lifting restrictions therefore are not qualified to perform "inside" jobs. J.A. 305.

The scarcity of non-heavy-lifting jobs means that trucking companies have few options for accommodating *any* employee with physical restrictions. They do not have readily available "light duty" jobs to offer. They have jobs driving trucks. Those jobs require the driver to be able to lift moderate to heavy weight. Trucking companies thus might be forced to, for example, assign a second employee to provide lifting assistance for a pregnant driver with a physical restriction if Petitioner were to prevail here. That is simply not feasible from an economic perspective.

As a result, whatever other industries might do, it is a virtual certainty that the trucking industry would react to a decision in favor of Petitioner by sharply reducing the accommodations it now offers to employees. That

would be bad for everyone except Petitioner. It would harm the ability of employers to help workers rehabilitate from injuries suffered on the job. It would harm those employees who have earned the right to an accommodation through their tenure with the company. It would treat unfairly those employees who have negotiated certain workplace rules through their union representative. And it would undermine company morale and thus hamper the industry's ability to compete for workers.

This would all come at a very precarious juncture for the trucking industry. The industry is currently in the midst of a severe driver shortage. Last year, ATA estimated a shortage of some 30,000 drivers in the for-hire truckload market alone, with an anticipated need for an average of 100,000 new drivers per year over a ten-year period to keep up with industry growth and driver attrition.[2] Ninety percent of carriers report that they are unable to find sufficient numbers of qualified drivers to haul the freight their shipper customers want them to move.[3]

This has led, predictably, to a concerted effort by trucking companies to attract and retain qualified drivers through, among other things, increased driver pay and

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2. Bob Costello, *Truck Driver Shortage Update 2013*, http://www.trucking.org/ATA%20Docs/News%20and%20Information/Reports%20Trends%20and%20Statistics/Driver%20Shortage%20Update%202 013.pdf.

3. *See, e.g.*, Mamata Badkar, *There's a Huge Shortage of Truck Drivers in America*, Business Insider (Aug. 4, 2014), http://www.businessinsider.com/americas-truck-driver-shortage-2014-7.

enhanced benefits and accommodations.[4] If forced to curtail accommodations that they would otherwise like to offer drivers and prospective drivers, this unprecedented shortage of drivers is only going to get worse.

CONCLUSION

Amicus curiae respectfully requests that the Court affirm the judgment below.

Respectfully submitted,

PRASAD SHARMA
RICHARD PIANKA
AMERICAN TRUCKING ASSOCIATIONS, INC.
950 N. Glebe Road
Arlington, VA 22203

THOMAS R. MCCARTHY
Counsel of Record
WILLIAM S. CONSOVOY
CONSOVOY MCCARTHY PLLC
3033 Wilson Blvd.
Suite 700
Arlington, VA 22201
(703) 243-4923
tom@consovoymccarthy.com

Attorneys for Amicus Curiae

October 31, 2014

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4. *See, e.g.*, Sean Kilcarr, *New Solutions Being Aimed at Driver Shortage*, Fleet Owner (Aug. 4, 2014), http://fleetowner.com/fleet-management/new-solutions-being-aimed-driver-shortage; Micael Calia, *Con-Way Beefs Up Driver Pay Packages for Freight Carrier*, Wall St. J. (Sept. 30, 2014), http://online.wsj.com/articles/ con-way-beefs-up-driver-pay-packages-for-freight-carrier-1412087980; Lynn Adler, *Companies Pile on Perks to Keep Drivers Truckin'*, Reuters (Aug. 10, 2012), http:// www.reuters.com/article/2012/08/10/uk-usa-truckers-shortage-idUSLNE87900X20120810.

AMICUS CURIAE BRIEF

No. 12-1226

IN THE
SUPREME COURT OF THE UNITED STATES

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF BIPARTISAN STATE AND LOCAL LEGISLATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ELLEN EARDLEY
Counsel of Record
MEHRI & SKALET, PLLC
1250 Connecticut Ave. NW
Suite 300
Washington, DC 20036
(202) 822-5100
eeardley@findjustice.com

Counsel for Amici Curiae

SEPTEMBER 11, 2014

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are bipartisan lawmakers from Delaware, Georgia, Illinois, Maryland, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, West Virginia, Wisconsin, as well as Philadelphia and New York City, committed to supporting America's working families. Recognizing that women's wages are critical to the economic security of their constituents, *Amici* introduced or supported legislation in their jurisdictions to ensure that pregnant workers can continue to work throughout their pregnancies if they wish. These bills expressly direct employers to provide reasonable accommodations to pregnant workers who need job modifications. The *Amici* parties' interest in this case is protecting the rights of their constituents. A list of the individual signatories is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Many women can continue working through their pregnancies with no issue, but some women find that certain job activities, such as heavy lifting or standing for long periods, become more difficult. The Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k), requires employers to offer such women reasonable accommodations—the same types of accommodations that federal, state, and local law

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation or submission. All parties consented to the filing of *amicus curiae* briefs in this matter.

already makes clear must be provided to employees with disabilities. Federal court decisions, like the one below, have erroneously suggested otherwise.

To fill the gap created by judicial misinterpretations of the PDA, Republican and Democratic legislators have passed commonsense legislation requiring workplace accommodations that enable pregnant women to stay employed. Keeping women who want to work on the job promotes financially stable, healthy families. It also benefits communities by bolstering the economy and reducing reliance on public assistance.

In sum, the Fourth Circuit's decision adopts a view inconsistent with the text of and the policies underlying the PDA, and in response to similarly flawed federal court decisions, *Amici* have been forced to enact legislation they would have previously thought unnecessary. The Fourth Circuit's ruling must be overturned to restore the true meaning of the PDA.

ARGUMENT

I. Providing Reasonable Accommodations to Pregnant Workers with a Medical Need Strengthens Working Families and Benefits Businesses.

The PDA mandates that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work." 42

U.S.C. § 2000e(k). In other words, "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job." *UAW v. Johnson Controls*, 499 U.S. 187, 204 (1991) (explaining second clause of the PDA).

Despite the promise of the PDA, pregnant workers seeking accommodations are sometimes forced to choose between their health and their paycheck as a result of court decisions (such as those below) misconstruing the PDA's plain language. In actuality, pregnant workers could maintain both their health and their paychecks with modest adjustments such as bathroom breaks, water breaks, and seating arrangements.

Pitting pregnant workers' health against their income can have devastating consequences. A family that is expecting a child cannot afford to lose a paycheck. Thus, some women who are denied accommodations may feel compelled to engage in workplace tasks that are contrary to their medical provider's advice, which increases health risks and may increase health care costs for employees and employers. Nat'l Women's Law Ctr. & A Better Balance, *It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers* 13 (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (employer denied pregnant worker's request to sit on a stool while she ran the cash register; she continued to work for economic reasons, but the pressure from standing caused bleeding and premature labor pains that forced the woman to take an unpaid leave of absence for the remainder of her pregnancy).

Women are the primary breadwinners in 41% of American families and the co-breadwinners in 64% of families. Sara Jane Glynn, Ctr. for Am. Progress, *The New Breadwinners: 2010 Update* 2 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf. Low-wage women workers are even more likely to be their families' primary breadwinners. At a time when American families are struggling to make ends meet, workplace accommodations allow these breadwinners to continue to collect a paycheck.

Businesses also benefit when workers receive accommodations and can continue to perform their jobs. The Job Accommodation Network (JAN), a technical assistance provider to the Department of Labor's Office of Disability Employment Policy, has studied the impact and cost of accommodating employees in the workplace pursuant to the Americans with Disabilities Act. It found that employers that offer employees accommodations enjoyed improved recruitment and retention of employees, increased employee commitment, increased productivity, reduced absenteeism, and improvements in workplace safety (and the resulting reduction in workers' compensation and other insurance costs). Beth Loy, JAN, *Workplace Accommodations: Low Cost, High Impact* 4–5 (2013), http://askjan.org/media/downloads/LowCostHighImpact.pdf.

Ninety percent of employers in the JAN study reported that workplace accommodations allowed them to retain valued employees, and 61% said that providing the modification "eliminated costs associated with training a new employee." *Id.* at 5.

Training new employees drains resources. It costs an employer 150% of a salaried employee's yearly salary to replace him or her. Jodie Levin-Epstein, Ctr. for Law and Soc. Policy, *Getting Punched: The Job and Family Clock: It's Time for Flexible Work for Workers of All Ages* 9 (2006), http://www.clasp.org/resources-and-publications/files/0303.pdf. For an hourly employee, turnover costs the employer anywhere from 50% to 75% of the employee's annual pay. *Id.*

Accommodating pregnant workers is likely to cost businesses less than disability accommodations. Pregnancy is by definition temporary. Further, relatively few workers give birth each year—only 1.6% of the total number of employed people and 4.7% of women of childbearing age. Nat'l Women's Law Ctr., *Fact Sheet: Pregnant Workers Make Up a Small Share of the Workforce and Can Be Readily Accommodated: A State-By-State Analysis* (2013), http://www.nwlc.org/sites/default/files/pdfs/state_by_state_analysis.pdf. A significantly smaller share of those workers need accommodations to remain at work.

Some employers may be unaware of the benefits that flow from accommodating pregnant workers. For example, UPS maintains a policy that provides light duty to three classes of workers—disabled employees, employees injured on the job, and employees who have lost their Department of Transportation certification—but not to pregnant workers. As a result, Petitioner Young was denied a light duty assignment when she became pregnant. She was forced on unpaid leave during her pregnancy and lost important income and health

insurance benefits. Her lawsuit affords this Court an opportunity to reaffirm commonsense principles of fairness and to ensure that pregnant mothers like Young are able to keep their paychecks during a critical time in family life, just as Congress intended.

II. The Fourth Circuit's Decision and Similar Decisions in Other Federal Courts Contravene the Text of the PDA and Harm State and Local Governments.

Applying an overly narrow interpretation of the PDA, the Fourth Circuit erred when it held that the PDA did not require UPS to provide light duty to pregnant employees even though this accommodation was available to three other groups of employees.

Numerous other decisions have likewise narrowly read the PDA and denied pregnant workers modest accommodations, such as light duty and water breaks, when similar accommodations were provided to other employees. *See, e.g., Serednj v. Beverly Healthcare LLC*, 656 F.3d 540 (7th Cir. 2011) (employer's practice of accommodating disabled workers and those injured on job, but not pregnant workers, did not violate PDA); *Wiseman v. Wal-mart Stores, Inc.*, No. 6:08-cv-01244 (D. Kan. July 23, 2009) (refusal to allow pregnant worker to carry water bottle did not violate PDA even though employer accommodated disabled employees).

This analysis is not supported by the text of the PDA, which requires employers to provide pregnant workers the same benefits that are

provided to workers "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). By extending light duty accommodations to some employees, but not to pregnant employees, the policy treats pregnant employees as second-class. This is exactly the type of pregnancy discrimination that the PDA forbids.

Decisions misinterpreting the PDA also hurt the economy and unnecessarily burden state and local governments. Pushed out of the workforce, expectant mothers—who would otherwise be contributing to the economy by purchasing supplies to prepare for the arrival of a child—have no income to spend. Moreover, pregnant workers deprived of income and employer-sponsored benefits may be forced to rely on government assistance, including welfare and Medicaid, rather than on the benefits they could earn if granted accommodations. *See, e.g.*, Nat'l Women's Law Center & A Better Balance, *supra,* at 11 (supermarket worker with a lifting restriction was sent home and onto disability insurance, which ended a month before she gave birth; she lost her health insurance and had to go on Medicaid).

III. Legislators From Both Sides of the Aisle Have Sought to Restore the Plain Meaning of the PDA within their Jurisdictions by Introducing and Passing Laws Reaffirming Pregnant Workers' Rights to Workplace Accommodations.

At least twelve states and several municipalities have passed laws requiring some

employers to provide reasonable accommodations to pregnant workers.[2] Similar bills were introduced in numerous jurisdictions in the past year, such as Georgia, Missouri, New York, Pennsylvania, Rhode Island, Wisconsin, and the District of Columbia. These measures, which aim to fill the gap created by courts' inappropriately narrow reading of the PDA, often receive overwhelming bipartisan support. Recently, legislators reached across the aisle to unanimously pass pregnancy accommodation measures in Delaware, Illinois, and West Virginia. New Jersey's law was adopted with just a single dissenting vote.

Generally, such remedial legislation simply requires that employers provide reasonable accommodations to women with work-related limitations arising out of pregnancy or childbirth—

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[2] The jurisdictions include Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas, and West Virginia as well as New York City, Philadelphia, and Central Falls and Providence, Rhode Island. Alaska Stat. § 39.20.520 (2013); Cal. Gov't Code § 12945 (Deering 2012); Conn. Gen. Stat. § 46a-60(a)(7) (2011); S.B. 212, 147th Gen. Assemb. (Del. 2014); Haw. Code R. § 12-46-107 (LexisNexis 1990); 775 Ill. Comp. Stat. 5/2-102 (2014); La. Rev. Stat. Ann. § 23:342 (1997); Md. Code Ann., State Gov't § 20-609 (LexisNexis 2013); H.F. 2536, 88th Leg., 2014 Sess. Law Ch. 239 (Minn. 2014); N.J. Stat. Ann. § 10:5-12(s) (West 2013); Tex. Loc. Gov't Code Ann. §180.004 (West 2001); W. Va. Code §§ 5-11B-1 to -7 (2014); New York City, N.Y., N.Y.C. Admin. Code § 8-107(22) (2013); Phila., Pa., Code § 9-1128 (2014); Central Falls, R.I., Ordinance Creating The Gender Equity in the Workplace Act (to be codified at Central Falls, R.I., Rev. Ordinance § 12-5); Providence, R.I., Ordinance in Amendment of the Code of Ordinances of the City of Providence Section 16-57 (to be codified at Providence, R.I., Code of Ordinances § 16-57).

just as the law already clearly requires employers to provide reasonable accommodations for disabilities. That is, this legislation restores the intent and purpose of the PDA.

State and local measures also reduce confusion created by federal courts' misreading of the PDA and help preempt unnecessary litigation by making employers' obligations and employees' rights crystal clear. Nationwide, pregnancy discrimination complaints are on the rise. Between 1997 and 2011, pregnancy discrimination charges filed with the EEOC and state fair employment practices agencies rose from 3,977 to 5,797, peaking at 6,285 in 2008. U.S. Equal Emp't Opportunity Comm'n, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997–2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm (last visited Sept. 7, 2014). In California, however, where a pregnancy accommodation law has been in place since 2000, the number of pregnancy discrimination claims filed with the California Department of Fair Employment and Housing decreased between 1997 and 2011. Noreen Farrell et al., Equal Rights Advocates, *Expecting a Baby, Not a Lay-Off: Why the Federal Law Should Require the Reasonable Accommodation of Pregnant Workers* 25 (2012), http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf.

Constituent stories motivated legislators across the country to take action to restore the meaning of the PDA. For example, Delaware legislators in both parties were shocked to learn

about pregnant women like Nicole Villanueva who was not permitted to work even though she was eager to and only required a modest accommodation. *See Villanueva v. Christiana Care Health Servs., Inc.*, No. Civ.A. 04-258-JJF (D. Del. Jan. 23, 2007). In Illinois, a pregnant warehouse worker was denied an accommodation, and her supervisor told her to choose either her job or her baby. In New York City, a pregnant retail worker was rushed to the emergency room when she fainted on the job because her supervisor would not permit her to drink water. Nat'l Women's Law Ctr. & A Better Balance, *supra*, at 12.

Legislators should not be forced to convene to reestablish basic protections that were incorporated into the PDA in 1978. This Court must correct the narrow reading of the Act by the Fourth Circuit and numerous federal courts and make clear that the PDA has prohibited treating pregnant workers worse than other employees for many years.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

ELLEN EARDLEY
Counsel of Record
MEHRI & SKALET, PLLC
1250 Connecticut Ave. NW
Suite 300
Washington, DC 20036
(202) 822-5100
eeardley@findjustice.com

SEPTEMBER 11, 2014

APPENDIX

LIST OF AMICI

The *Amici* are state and local lawmakers who have introduced, sponsored or supported legislation to reaffirm the Pregnancy Discrimination Act and ensure that employers grant pregnant women the same types of accommodations provided to others in the workplace. These *Amici* are listed below.

Senator Diane B. Allen (R-7)
New Jersey Senate

Delegate Jason Barrett (D-61)
West Virginia House of Delegates

Council Member Cindy Bass (D-8)
Philadelphia City Council

Senator Daniel Biss (D-9)
Illinois General Assembly

Senator Colin Bonini (R-16)
Delaware General Assembly

Councilwoman Blondell Reynolds Brown
(D-At-Large)
Philadelphia City Council
Majority Whip

Delegate Al Carr (D-18)
Maryland General Assembly

Representative Kelly Cassidy (D-14)
Illinois General Assembly

Senator Catherine Cloutier (R-5)
Delaware General Assembly

Delegate Bonnie Cullison (D-19)
Maryland General Assembly

House Majority Leader Barbara Flynn Currie (D-25)
Illinois General Assembly

Representative Sara Feigenholtz (D-12)
Illinois General Assembly

Council Member Julissa Ferreras (D-21)
New York City Council

Delegate Barbara Evans Fleischauer (D-51)
West Virginia House of Delegates

Representative Mary E. Flowers (D-31)
Illinois General Assembly

Representative Robyn Gabel (D-18)
Illinois General Assembly

Representative Eric Genrich (D-90)
Wisconsin State Assembly

Senator Gayle L. Goldin (D-3)
Rhode Island General Assembly

Councilman William K. Greenlee (D-At-Large)
Philadelphia City Council
Majority Deputy Whip

Delegate Nancy Peoples Guthrie (D-36)
West Virginia House of Delegates

Senator Bethany A. Hall-Long (D-10)
Delaware General Assembly

Senator Kemp Hannon (R-6)
New York State Senate

Representative Greg Harris (D-13)
Illinois General Assembly

Delegate Tom Hucker (D-20)
Maryland General Assembly

Senator Toi W. Hutchinson (D-40)
Illinois General Assembly

Delegate Ariana Kelly (D-16)
Maryland General Assembly

Senator Liz Krueger (D-28)
New York State Senate

Senator David G. Lawson (R-15)
Delaware General Assembly

Senator Ernesto B. Lopez (R-6)
Delaware General Assembly

Delegate Charlene Marshall (D-51)
West Virginia House of Delegates

Assemblywoman Shelley Mayer (D-90)
New York Assembly

Senator Karen McConnaughay (R-33)
Illinois General Assembly

Deputy Minority Whip Stacey Newman (D-87)
Missouri House of Representatives

Senator Nan Orrock (D-36)
Georgia State Senate

Delegate Don Perdue (D-19)
West Virginia House of Delegates

Senator Karen Peterson (D-9)
Delaware General Assembly

Senator Brian G. Pettyjohn (R-19)
Delaware General Assembly

Delegate Meshea Poore (D-37)
West Virginia House of Delegates

Delegate Kirill Reznik (D-39)
Maryland General Assembly

Deputy Majority Leader Deborah Rose (D-49)
New York City Council

Delegate Stephen Skinner (D-67)
West Virginia House of Delegates

Senator Matt Smith (D-37)
Senate of Pennsylvania

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West Virginia House of Delegates

Senator Heather Steans (D-7)
Illinois General Assembly

Assemblymember Phil Steck (D-110)
New York Assembly

Senator Lena Taylor (D-4)
Wisconsin State Senate

Council Member James Vacca (D-13)
New York City Council

Senator Chris Walters (R-8)
West Virginia Senate

Senate Majority Leader Loretta Weinberg (D-37)
New Jersey Senate

Representative Ann Williams (D-11)
Illinois General Assembly

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* BLACK WOMEN'S HEALTH IMPERATIVE, JOINED BY OTHER BLACK WOMEN'S HEALTH ORGANIZATIONS, IN SUPPORT OF PETITIONER

Jonathan M. Cohen
Counsel of Record
Kami E. Quinn
Jenna A. Hudson
Kristiné Hansen
James Liddell
GILBERT LLP
1100 New York Ave., N.W.
Suite 700
Washington, DC 20005
(202) 772-2259
cohenj@gotofirm.com

Counsel for Black Women's Health Imperative

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the Black Women's Health Imperative (the "Imperative"), and the parties that join it in filing this brief are public interest organizations that focus on the health of Black women and their families. Each of these organizations addresses issues important to the Black community involving pregnancy and pregnancy-related conditions, including through advocacy and other programs.

The Imperative is the only organization in the United States devoted solely to advancing the health of this country's approximately 20 million Black women through advocacy, community health and wellness education, and leadership development. Rather than just documenting the enormous health disparities that exist for Black women, the Imperative takes action to place Black women and their experiences at the forefront and expose the conditions and systems that impose undue health burdens on Black women. The Imperative's work underscores how inequalities and complexities in Black women's lives profoundly impact their reproductive choices and rights, as well as their

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* notes that the position it takes in this brief has not been approved or financed by Petitioner, Respondent, or their counsel. Neither Petitioner, Respondent, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, a*micus curiae* states that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

healthcare decisions. Pregnancy, childbirth, and related medical issues are a major focus of the Imperative's mission, as is the related issue of economic security for Black families.

The Imperative is joined in this brief by two organizations with which it partners to improve the health of Black women nationwide: Black Women for Wellness ("BWW") and New Voices Pittsburgh: Women of Color for Reproductive Justice ("New Voices").

BWW seeks to empower the health and wellbeing of Black women and girls in Los Angeles and throughout California. BWW has worked for more than seventeen years to expand access to reproductive and sexual health and rights by supporting state and county policy implementation and regulations, providing sex education and outreach to youth, sharing information with consumers on reproductive and neurological toxins, implementing healthy eating and exercise programs to prevent obesity and infertility, conducting research with beauty professionals to determine the impacts of chemical exposure on health, organizing and mobilizing around local and statewide elections, and publishing voter education and information materials culturally relevant to the Black community.

New Voices is the premier reproductive justice and human rights organization in the Greater Pittsburgh Region. The mission of New Voices is to build a social change movement dedicated to the health and wellbeing of Black women and girls

through leadership development, human rights, and reproductive justice. Over the last decade, New Voices has served more than 10,000 women and girls of color. New Voices is expanding into both a statewide and national organization with the formation of New Voices Philadelphia and New Voices Cleveland.

As part of their advocacy for the health of Black women and their families, the Imperative and its partners seek to prevent Black women from being forced to choose between their jobs and the health of their pregnancies. As discussed below, Black women disproportionately hold jobs that require physical exertion that may be unsafe while pregnant. Many of these women's employers, however, do not accommodate their pregnancies or related conditions, even if they would accommodate employees who have similar physical limitations. Black women thus are disproportionately put to a Hobson's choice between the economic security that their current jobs provide and the health of themselves and their children.

The Imperative and its partners advocate on behalf of women who, in the absence of employer accommodation, would be put to this Hobson's choice. They therefore have a deep interest in the Pregnancy Discrimination Act's requirement that employers accommodate employees with pregnancy-related impediments as they do employees who are similar in their ability or inability to work but not impeded by pregnancy-related issues. Accordingly, the Imperative supports Petitioner's appeal and

respectfully requests that this Court reverse the decision below.

SUMMARY OF ARGUMENT

In this brief, *amicus curiae* shows the substantial extent to which failing to accommodate pregnancy and related conditions negatively impacts women, families, and communities – particularly Black women, families, and communities. Congress passed the Pregnancy Discrimination Act (the "Act") based on a substantial legislative record demonstrating these negative effects, and the legislative history shows that Congress intended the second clause of the Act to protect pregnant women by requiring broader accommodation than what otherwise may have been required under the Civil Rights Act. As this brief discusses, the negative effects that drove Congress to craft the broad requirement of the Act's second clause continue to affect women and their families to this day, and particularly Black women and their families. Because Congress enacted the broad protections contained in the Act's second clause to address these harmful effects, *amicus curiae* supports Petitioner in respectfully requesting that this Court reverse the court below.

ARGUMENT

I. CONGRESS INCLUDED THE SECOND CLAUSE OF THE ACT TO PREVENT FAILURES TO ACCOMMODATE.

Title VII of the Civil Rights Act seeks to provide equal employment opportunities by, in part,

requiring employers to treat equally employees who are similar to each other "in all respects" other than their membership in a protected class.[2] Congress included sex as a protected class in the Civil Rights Act, but originally it did not expressly state that sex includes pregnancy and related conditions. As a result, this Court held in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that Title VII did not require equal treatment of pregnancy and related conditions.

Following this Court's decision in *Gilbert*, Congress passed the Act. The Act clarifies that sex includes pregnancy and related conditions, thus requiring employers generally to accommodate pregnancy-related limitations in the same manner as the Civil Rights Act applies to sex-based issues more broadly. The Act, however, goes further. It includes a second statutory clause that expressly requires employers to accommodate pregnant women on the same basis as they accommodate other employees to whom they are similar only in their "ability or inability to work."[3] By its plain terms, this second clause of the Act expands the protections for pregnancy and related conditions beyond the Civil Rights Act's requirement that employers treat all employees the same as other employees who are similar to them "in all respects."[4]

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[2] *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

[3] 42 U.S.C. § 2000e(k).

[4] *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (quoting *Mitchell*, 964 F.2d at 583).

Congress expanded the scope of the Act beyond the protections of the Civil Rights Act purposefully. Congress's statutory language is the best evidence of this intent.[5] However, even if that language were ambiguous, the statute's legislative history evidences Congress's intent.

As the Act's legislative history shows, Congress recognized that failing to equally accommodate pregnant employees was a "significant barrier to the equal participation of women in the labor market" and "historically had a persistent and harmful effect upon [women's] careers."[6] Congress thus found that "[i]t would be difficult to overstate the importance of removing this barrier to equal employment opportunity for women affected by pregnancy."[7] For this reason, Congress used broader wording in the Act's second clause, which Congress recognized would require employers to "transfer[] workers to lighter assignments or [apply] other practices, so long as the requirements and benefits are administered equally for all workers in terms [of] their actual ability to perform work."[8]

Congress was prescient in its stated concern that lack of accommodation could prove harmful to women and their families and communities. Indeed,

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[5] *See* 42 U.S.C. § 2000e(k).

[6] *See* S. Rep. No. 95-331, 95th Cong., 1st Sess. at 9 (1977) (quoting statement of Ethel Bent Walsh, Vice Chairman, Equal Employment Opportunity Commission, before the Senate Labor Subcommittee, April 26, 1977, p. 1); H.R. Rep. No. 95-948, 95th Cong. 2d Sess. at 6 (1978).

[7] S. Rep. No. 95-331 at 9.

[8] *See* H.R. Rep. No. 95-948 at 5.

evidence of the pernicious effects of failing to accommodate pregnant women has continued to mount since Congress passed the Act. Congress considered, and the evidence continues to show that, when employers do not accommodate pregnant women on the same basis as they accommodate other employees, many women – and Black women in particular – must choose between their jobs and the health of their pregnancies. As a result, these women lose economic security, and suffer significant adverse consequences. In addition, Congress considered, and the evidence continues to show that, failing to accommodate women equally also disadvantages women's families and communities by creating a cycle of poverty – particularly for Black families and Black communities.

II. APPLYING THE SECOND CLAUSE OF THE ACT AS WRITTEN CONTRIBUTES TO EQUAL OPPORTUNITY FOR WOMEN (PARTICULARLY BLACK WOMEN).

In passing the Act, Congress found that the failure to accommodate equally pregnant employees was a "significant barrier to the equal participation of women in the labor market."[9] Congress also identified the failure to accommodate pregnancy equally as a root cause of women disproportionately being stuck in "low-paying, dead-end jobs."[10]

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[9] S. Rep. No. 95-331 at 9 (quoting statement of Ethel Bent Walsh, Vice Chairman, Equal Employment Opportunity Commission, before the Senate Labor Subcommittee, April 26, 1977, p. 1).

[10] *Id.* at 6; *see also* H.R. Rep. No. 95-948 at 3.

Congress drew these conclusions when only 46 percent of women over the age of 16 were part of, or looking to join, the workforce.[11] With this number in mind, it found that "[i]t would be difficult to overstate the importance of removing this barrier to equal employment opportunity for women affected by pregnancy."[12]

Today, the impact of failing to accommodate women affected by pregnancy is even broader. Department of Labor statistics show that, as of 2010, 58.6 percent over the age of 16 were part of, or looking to join, the workforce.[13] This statistic is significant because 75 percent of women who enter the workforce today will become pregnant at least once during their careers, and many women will be pregnant while looking for employment.[14]

Most of these women will work while pregnant, many well into the ninth month of pregnancy.[15] According to the Census Bureau, 62 percent of women in the United States work during

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[11] *See* S. Rep. No. 95-331 at 128.

[12] *See id.*

[13] U.S. Dep't. of Labor, *Women in the Labor Force in 2010*, http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm (last visited Sept. 10, 2014).

[14] *See* Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 Journal of Applied Psychology 1499, 1499-1511 (2007), *available at* http://mason.gmu.edu/~eking6/HeblKingJAP2007.pdf.

[15] *See* Tallesse D. Johnson, *Maternity Leave and Employment Patterns of First-Time Mothers*, U.S. Census Bureau (2008), *available at* http://www.census.gov/prod/2008pubs/p70-113.pdf.

the same year in which they give birth.[16] Further, "in every single state in 2012, the majority of women who gave birth in a one-year period were also in the labor force."[17] These statistics show that, just as Congress found when it passed the Act, a significant percentage of women face potential workplace discrimination based on pregnancy and pregnancy-related conditions.

Congress correctly found that pregnancy-related discrimination often takes the form of the failure to provide accommodations equal to what others with similar limitations enjoy.[18] When a woman is forced to leave her job as a result of an employer's failure to accommodate her pregnancy, even for a short period of time, she suffers economic injury that can reverberate long after her pregnancy has ended.

This continues to affect women, just as it did when Congress made its findings and enacted the Act. For example, once a woman loses her job due to lack of accommodation, it becomes materially more difficult for her to regain employment. A Federal Reserve Bank study found that 13 percent of men and women that lost full-time jobs were

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[16] *See* U.S. Census Bureau, *Am. Cmty. Survey 1 Year Estimates, Geographies: All States within United States, Table B13012: Women 16 to 50 Years Who had a Birth in the Past 12 Months by Marital Status and Labor Force Statistics*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_B13012&prodType=table, (last visited Sept. 10, 2014).

[17] *Id.*

[18] *See* S. Rep. No. 95-331 at 128; H.R. Rep. No. 95-948 at 6.

subsequently only able to find part-time work, and approximately 35 percent are not able to secure new employment within a year of searching.[19] Additionally, the same Federal Reserve Bank study found that when men and women were able to find new full-time work after a short break in employment, they earned an average of 13-17 percent less at their new jobs.[20] Moreover, women are less likely than men to secure new employment, so their prospects for finding employment after losing a job due to an employer's failure to provide accommodations and/or earning an income commensurate with their previous positions likely are even bleaker.[21] In fact, the Department of Labor has found that women are nearly twice as likely as men to work part-time, and that one in five women working part-time does so because she is unable to find full-time work.[22]

Losing a job can mean losing more than just income; periods of unemployment can cause workers' job skills to atrophy, making them less attractive to potential employers and depressing their future wages.[23] According to one

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[19] *See* Henry S. Farber, *What Do We Know About Job Loss In The United States? Evidence from the Displaced Workers Survey, 1984-2004*, Federal Reserve Bank of Chicago, 24 (2005), http://www.chicagofed.org/digital_assets/publications/economic_perspectives/2005/ep_2qtr2005_part2_farber.pdf.

[20] *See id.* at 25.

[21] *See id.* at 18.

[22] *See* U.S. Dep't. of Labor, *Women's Employment During the Recovery*, http://dol.gov/_sec/media/reports/femalelaborforce (last visited Sept. 10, 2014).

[23] *See* Sherif Khalifa, *Labor Mismatch, Skill Obsolescence, and Unemployment Persistence*, Cal. State Univ., Fullerton, 2, 4

study, workers lose five percentile points worth of job skills for every year of unemployment.[24] This again leads to a decrease in wages. Even once reemployed, research shows that "displaced workers face significant earnings losses [for] up to 20 years after being laid-off, with wages about 15 percent lower for laid-off workers after being reemployed compared to workers who were employed continuously."[25]

Moreover, some employers screen out applicants based on duration of unemployment.[26] Indeed, "[l]ong term unemployed workers with relevant work experience are less likely to be invited for an interview than recently unemployed job applicants with no relevant experience."[27] Thus,

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(2013), http://www.business.fullerton.edu/economics/skhalifa/PDFPaper16.pdf.

[24] *See* Per-Anders Edin & Magnus Gustavsson, *Time Out Of Work And Skill Depreciation*, 61 Cornell Indus. & Lab. Rel. Rev. 163, 163 (2008), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1318&context=ilrreview; *see also* Executive Office of the President, *Addressing the Negative Cycle of Long-Term Unemployment*, 5, 16-17 (Jan. 2014), http://www.whitehouse.gov/sites/default/files/docs/wh_report_addressing_the_negative_cycle_of_long-term_unemployment_1-31-14_-_final3.pdf [hereinafter *Addressing the Negative Cycle of Long-Term Unemployment*].

[25] *Addressing the Negative Cycle of Long-Term Unemployment*, *supra* note 24, at 4 (citing Justin Barnett & Amanda Michaud, *Wage Scars from Job Loss* (U. MN., Working Paper, 2012)).

[26] *See id.* at 14. (citing Rand Ghayad, *The Jobless Trap* (Northeastern University Dep't. of Economics, Working Paper, 2013), *available at* http://media.wix.com/ugd/576e9a_f6cf3b6661e44621ad26547112f66691.pdf).

[27] *Id.* (emphasis omitted).

failing to accommodate women can lead to permanent and substantial economic damage.

Black women are more likely than women of other racial backgrounds to require accommodations for pregnancy-related conditions. The reason is that, according to the Bureau of Labor Statistics, Black women are overrepresented in low-wage jobs, accounting for 15 percent of women making the minimum wage despite constituting less than 13 percent of the female workforce.[28] These jobs are more likely than higher-wage jobs to be physically demanding, making accommodations more important because physically demanding work carries a statistically-significant increased risk of preterm delivery and low birth weight.[29]

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[28] *It Shouldn't Be A Heavy Lift: Fair Treatment For Pregnant Workers*, Nat'l Women's Law Ctr., 7 (2013), http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf [hereinafter *It Shouldn't Be A Heavy Lift: Fair Treatment For Pregnant Workers*] (citing *Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage*, Nat'l Women's Law Ctr. (Sept. 5, 2014), http://www.nwlc.org/sites/default/files/pdfs/fair_pay_for_women_requires_increasing_the_minimum_wage_and_tipped_minimum_wage_sept_2014.pdf [hereinafter *Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage*]; U.S. Bureau of Labor Statistics, *Table 4. Employed Foreign-Born and Native-Born Persons 16 Years and Over by Occupation and Sex, 2013 Annual Averages*, (May 22, 2014), http://www.bls.gov/news.release/forbrn.t04.htm; U.S. Bureau of Labor Statistics *Current Population Survey, 2012 Annual Averages Table 39*, http://www.bls.gov/cps/cpsaat39.pdf (last visited Sept. 10, 2014)).

[29] *See* Letter from Wendy Chavkin, MD, MPH, to New York City Council Member James Vacca, (Nov. 29, 2012),

Low-wage jobs also are less likely to have flexible schedules or offer accommodations.

> Over 40 percent of full-time low-wage workers report that their employers do not permit them to decide when to take their breaks; between two-thirds and three-quarters of full-time low-wage workers report that they are unable to choose their start and quit times; and roughly half report having very little or no control over the scheduling of hours more generally.[30]

Accordingly, Black women are more likely to require accommodations and less likely to receive them.

In passing the Act, Congress looked at evidence of the effects that failing to accommodate pregnancy and related conditions have on women. Recognizing the importance of these negative effects prompted Congress to draft the broader second clause of Act to require that pregnant women be treated the same as other employees "similar in their ability or inability to work." Congress's conclusion that it was necessary to broaden the scope of

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available at http://www.abetterbalance.org/web/images/stories/Chavkin_letter_FINAL.pdf.

[30] *See It Shouldn't Be A Heavy Lift: Fair Treatment For Pregnant Workers*, *supra* note 28, at 7 (citing Liz Watson & Jennifer Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, Georgetown Law & Univ. KY, 19 (May 2011), http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf).

protection through the second clause was well supported then, and the trends that Congress sought to remedy continue today (especially for Black women).

III. WITHOUT THE SECOND CLAUSE OF THE ACT, FAMILIES AND COMMUNITIES (AND PARTICULARLY BLACK FAMILIES AND COMMUNITIES) SUFFER LASTING HARM.

When it passed the Act, Congress also considered the impact that failing to accommodate pregnancy in the workforce would have on women's families and, by extension, their communities. When Congress passed the Act, it recognized that women contributed more than 40 percent of the total household income in 24 percent of American families.[31] It also recognized that 70 percent of all women working in America were either the sole wage earner in their households (either because their husbands did not work or because they were single, divorced, or widowed) or had a spouse who made less than $7,000 per year (approximately 231 percent of the poverty line for a man with a two person family with a female head of household in 1977).[32] Congress also found that 10 percent of children being born at the time would be raised by a mother who was the sole worker in her household.[33] Accordingly, when Congress passed the Act, it did so

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[31] S. Rep. No. 95-331 at 9.

[32] *Id.*; U.S. Census Bureau, *Poverty Thresholds 1977*, https://www.census.gov/hhes/www/poverty/data/threshld/thresh77.html (last visited Sept. 10, 2014).

[33] S. Rep. No. 95-331 at 9.

recognizing that women played a major part in their families' economic security.

Since Congress passed the Act, women have come to contribute even more significantly to family income. In 2011, 40 percent of women in the workforce were the head of household.[34] Of these female heads of household, "37 [percent] are married mothers who have a higher income than their husbands," and "63 [percent] are single mothers."[35] In 2013, 69.9 percent of married mothers and 84.2 percent of single mothers were members of the workforce.[36]

Moreover, as women's financial contributions to their families increase, so too does the potential for economic harm to families and communities if pregnancy is not accommodated. As discussed above, when women lose their jobs, they often are unable to secure new jobs, and if they do, those jobs often pay less than their previous jobs, leading to increasing economic damage.[37] Research shows that the children of economically disadvantaged parents experience poverty at sharply higher rates than the

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[34] Wendy Wang, Kim Parker & Paul Taylor, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend*, Pew Research Center (May 29, 2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf.

[35] *Id.*

[36] U.S. Dep't. of Labor, *Latest Annual Data*, http://www.dol.gov/wb/stats/recentfacts.htm (last visited Sept. 10, 2014).

[37] *See* Farber, *supra* note 19, at 18.

general public. [38] Moreover, such workers often cannot afford to provide extracurricular support to educate and nurture their children.[39] Consequently, children in low-income families are more likely to drop out of school, experience health problems, and bear children at a young age – potentially perpetuating the cycle for yet another generation.[40]

These problems are particularly pronounced in the Black community because Black women are overrepresented in low-wage jobs, and are more likely than women of other racial backgrounds to have to support children on their own. "Among mothers with children under 18, Black mothers (75.6 percent) were more likely to be in the labor force than White (69.6 percent), Asian (64.2 percent), or Hispanic (61.2 percent) mothers."[41] Additionally, single working mothers who are the sole breadwinner are more likely to be young Black women or Hispanic women than women of any other race.[42]

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[38] *See* John Irons, *Economic Scarring: The Long-Term Impacts of the Recession*, Economic Policy Institute, (Sept. 30, 2009), https://docs.google.com/viewer?url=http://www.epi.org/page/-/img/110209scarring.pdf&hl=en_US&embedded=true.

[39] *See* Lisa Dodson & Randy Albelda, *How Youth Are Put At Risk By Parents' Low-Wage Jobs*, UMASS Boston Ctr. For Social Policy (2012), http://cdn.umb.edu/images/centers_institutes/center_social_policy/Youth_at_RiskParents_Low_Wage_Jobs_Fall_121.pdf.

[40] *See id.* at 1, 12-14.

[41] U.S. Bureau of Labor Statistics, Rep. 1050, *Labor Force Characteristics by Race and Ethnicity, 2013*, 6 (May 2013), *available at* http://www.bls.gov/cps/cpsrace2013.pdf; *see also id.* at 37-39.

[42] *See* Wang, Parker & Taylor, *supra* note 34, at 1, 18-19.

Moreover, economic security and equality of opportunity are directly connected to the success of the next generation.[43] Thus, the inter-generational consequences of failing to accommodate pregnancy-related limitations fall most heavily on Black families and communities, creating a cycle of poverty and disadvantage.[44]

Research shows that "young people in single-parent families and families of color face exaggerated challenges and responsibilities that may demand more of their parent's time and attention to assist family needs than other youth."[45] These same children "face safety issues that might be mitigated by parents' higher income and by greater flexibility in work schedules that would enable parents to be available more to protect and monitor their adolescents."[46]

The consequences of forcing women, and particularly Black women, to choose between their jobs and the health of their pregnancies can be long lasting and widespread. Congress knew this, and drafted the second clause of the Act to try to prevent it. Accordingly, the Court should interpret that clause to provide the protection to women, and especially Black women, that Congress intended.

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[43] *See* Irons, *supra* note 38, at 2; *see also* Dodson & Albelda, *supra* note 39, at 9-12.

[44] *See Fair Pay for Women Requires Increasing the Minimum Wage and Tipped Minimum Wage*, *supra* note 28; Barbara Ehrenreich, *It Is Expensive To Be Poor*, The Atlantic (Jan. 13, 2014), http://www.theatlantic.com/business/archive/2014/01/it-is-expensive-to-be-poor/282979.

[45] Dodson & Albelda, *supra* note 39, at 17.

[46] *See id.*

IV. CONCLUSION

For the reasons set forth above, the Imperative supports Petitioner and respectfully requests that this Court reverse the decision below.

September 11, 2014

Respectfully submitted,

Jonathan M. Cohen
Counsel of Record
Kami E. Quinn
Jenna A. Hudson
Kristiné Hansen
James Liddell
GILBERT LLP
1100 New York Ave., N.W.,
Suite 700
Washington, DC 20005
(202) 772-2259
cohenj@gotofirm.com

AMICUS CURIAE BRIEF

No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT IN SUPPORT OF AFFIRMANCE

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com
Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether respondent United Parcel Service violated the Pregnancy Discrimination Act amendment to Title VII of the Civil Rights Act of 1964 when it treated petitioner the same as employees with similar restrictions resulting from off-the-job injuries or conditions.

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No. 12-1226

In the Supreme Court of the United States

PEGGY YOUNG,

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For over thirty years, Eagle

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; The petitioner and respondent have lodged their blanket consent with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Forum has consistently defended federalism and supported States' autonomy from federal intrusion in areas – such as employment law – that are of traditional state and local concern. In addition, Eagle Forum has longstanding interest in adherence to the Constitution as written. In connection with that, Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement to oppose ratification by the states of the proposed Equal Rights Amendment, H.J. RES. 208, 86 Stat. 1523 (1972) ("ERA"), in the 1970s and 1980s. The history of that effort has a direct bearing on the issues that this litigation attempts to import into federal anti-discrimination law. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Respondent Peggy Young ("Young") has sued her former employer, United Parcel Service ("UPS"), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. §2000e(k), for failing to allow her to take "light-duty work" when her doctor advised her not to lift packages over 20 pounds during her pregnancy. The district court granted summary judgment to UPS, and the Fourth Circuit affirmed.

Factual Background

Amicus Eagle Forum adopts UPS's statement of the facts. UPS Br. at 1-7. In summary, Young's job with UPS involved driving a truck and picking up and delivering packages, which the parties agree required lifting up to 70 pounds. *Id.* at 2. In 2006, Young requested and was granted leave to undergo

in vitro fertilization, and after she became pregnant was instructed by her doctor not to lift more than 20 pounds for the duration of her pregnancy. *Id.*

At the time that Young sought light-duty work, UPS accommodated three types of alternate work arrangements for drivers like Young: (1) light-duty work, known as temporary work assignments, for workers injured on the job; (2) accommodation under the Americans with Disabilities Act, 42 U.S.C. §§12101-12213 ("ADA"); and (3) "inside" work assignments for drivers who lose their Department of Transportation ("DOT") certification for any reason, such as loss of a driver's license or involvement in an accident. UPS Br. at 2-3.[2]

Significantly, the first category was generally limited to 30 days to allow the driver to recuperate, although that could be extended – usually no more than up to two weeks – if a doctor stated that the driver would be able to return to regular work in that timeframe. *Id.* at 3. For the second category (ADA accommodation), UPS adopted the relief on a case-by-case basis. The third category ("inside" work) involved lifting packages over 20 pounds. *Id.* UPS never approved light-duty work for drivers injured off the job, unless the injury triggered the ADA's legal requirements for accommodation. *Id.* at 5.

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[2] In addition, for drivers unlike Young who worked in states that required such accommodation as a matter of state law, UPS's collective bargaining agreement allowed light-duty work for pregnancy-related restrictions on lifting, when certified by a physician and in compliance with applicable laws. *Id.* at 4.

Thus, although some pregnant UPS drivers continued their full duties throughout pregnancy, Young had to take a leave of absence. *Id.* at 7. Although she therefore lost her UPS medical coverage, she was fully insured through her husband's plan. *Id.* at 7 & n.3.[3] Prospectively, UPS has adopted a new policy to allow light-duty work for pregnant employees with lifting or other physical restrictions. UPS Br. App. 1a.

Statutory Background

As relevant here, Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of [an] individual's ... sex." 42 U.S.C. §2000e-2(a)(1). To show discrimination *because of* a protected status, this Court has read Title VII to allow proving the intent to discriminate by comparing an employer's actions regarding the plaintiff to its actions regarding similarly situated employees of a different status (*e.g.*, comparing treatment of women versus men). *See, e.g., TWA v. Hardison,* 432 U.S. 63, 71-72 (1977); *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 705 n.5 (1978); *Hazelwood Sch. Dist. v. U.S.,* 433 U.S. 299, 308 (1977). As enacted, Title VII did not extend to the states, but the 1972 amendments

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[3] If Young had lacked access to alternate coverage through her husband, she could have extended her UPS coverage. *See Geissal v. Moore Med. Corp.*, 524 U.S. 74, 76 (1998) (discussing portability of insurance upon leaving employment).

extended it to states,[4] which this Court upheld as a valid abrogation of Eleventh Amendment immunity in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

As relevant here, Title VII's type of "because of" discrimination means intentional discrimination, which means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Reasoning that discrimination because of *pregnancy* is not the same as discrimination because of *sex*, this Court allowed a company insurance plan to exclude pregnancy from coverage in *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (*citing Geduldig v. Aiello*, 417 U.S. 484, 487-89 (1974)).

Congress responded to *Gilbert* by enacting the PDA, Pub. L. No. 95-555, 92 Stat. 2076 (Oct. 31, 1978) ("PDA"). As applicable here, PDA amended Title VII's definitions section to add new §701(k), the relevant part of which provides as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related

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[4] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2, 86 Stat. 103 (Mar. 24, 1972).

> medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work[.]

42 U.S.C. §2000e(k). The committee reports indicate that PDA "does not change the application of title VII to sex discrimination in any other way" than to "defin[e] sex discrimination, as proscribed in the existing statute to include" "pregnancy, childbirth, and related medical conditions," S. REP. NO. 95-331, at 3-4 (July 6, 1978); *accord* H.R. REP. NO. 95-948, at 4-5 (Mar. 13, 1978).

Like the statute itself, the legislative history does not expressly indicate whether §701(k)'s "ability or inability to work" criterion is cumulative with the existing framework under §703(a)(1) or instead supplants that framework as the new, sole criterion for pregnancy-related discrimination:

> By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not

> able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.

S. REP. NO. 95-331, at 3; *accord* H.R. REP. NO. 95-948, at 4-5. At the time that Congress acted, "almost half of the States presently interpret[ed] their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth." H.R. REP. NO. 95-948, at 3; *accord* S. REP. NO. 95-331, at 3 ("25 States presently interpret[ed] their own fair employment practices laws to prohibit sex discrimination based on pregnancy and childbirth").

SUMMARY OF ARGUMENT

In the parties' dispute over whether §701(k)'s second sentence supplements (UPS) or supplants (Young) the pre-existing Title VII framework for analyzing sex-based discrimination in the context of pregnancy and related conditions, UPS provides the better plain-language reading of Title VII. Consistent with §701(k)'s text, the first sentence puts pregnancy-based discrimination within the ambit of sex-based discrimination, *and* the second sentence directs an *additional* criterion. Contrary to Young's arguments, an "ability or inability to work" criterion is not mere surplusage if it fails to eradicate distinctions between coverage for on-the-job injuries and off-the-job injuries and conditions. Under UPS's reading, the criterion would prohibit, for example, employer distinctions between types of injuries or conditions (*e.g.*, physical versus mental) or treatments (*e.g.*, medication versus bandaging, casts, or dressing of the injured area). Moreover, UPS's

limited reading of PDA's intervention is consistent with the legislative history that disclaims any intent other than to reverse *Gilbert*. Finally, several canons of statutory construction support UPS's reading.

Insofar as states already had entered the field of both sex-based discrimination and pregnancy-based sex discrimination, this Court should not presume that Congress intended to overturn state laws by eliminating the concept of similarly-situated comparators in pregnancy-discrimination cases. In the same way, the canon against reading statutes to repeal prior statutes by implication also supports UPS's narrow reading. In addition, Young has no claim to an implied private right of action under §701(k), but must instead proceed under §703(a)(1), which includes the concept of similarly-situated comparators. Finally, although UPS itself is not a state entity entitled to sovereign immunity, Young's broad reading would – as explained below – exceed the power of Congress as applied to states. As such, the canon of constitutional avoidance argues for the UPS reading as a way to avoid an unconstitutional statute as applied to states.

Although Congress enacted Title VII under both the Commerce Clause and, as to states, Section 5 of the Fourteenth Amendment, Congress can abrogate states' sovereign immunity only under Section 5. For Congress to do so, there must be a violation of Equal Protection taking place. Unlike prior decisions that have upheld abrogating states' sovereign immunity to address *sex discrimination*, the PDA reading pressed by Young and her *amici* seeks preferential treatment (not non-discrimination) based on the

state of being pregnant (not based on sex). Because pregnancy discrimination is reviewed under the rational-basis test – not elevated scrutiny – under this Court's equal-protection cases, that distinction makes it more difficult to justify federal intrusion. As such the proposed congressional action is not sufficiently congruent or proportional to the supposed violation of the Equal Protection Clause that – under the PDA reading pressed by Young – Congress would be trying to eradicate. Nor can Young rely on the broad protections of the ERA, which (of course) was not ratified. Finally, this Court should disregard the *post hoc* guidance issued by the Equal Employment Opportunity Commission ("EEOC") because the guidance is inconsistent not only with PDA and the Constitution, but also with prior executive-branch interpretations of PDA. This Court is faced, then, with two possible solutions: (1) adopt UPS's narrow reading, consistent with the legislative history, or (2) find that PDA is unconstitutional as applied to states or that Congress did not intend PDA to apply to state employers.

Amicus Eagle Forum also responds to the policy arguments made by Young and her *amici*. In sum, the preferential treatment that they press would be ill-advised public policy, and is not something that Congress ever enacted. As with many well-meaning efforts at social engineering, Young's reading of PDA would harm not only the intended beneficiaries but also coworkers (who must support the beneficiaries) and economic competitors (who are disadvantaged by the bestowing of preferential treatment on others).

Finally, the suggestion that Young's reading of PDA is the pro-life reading is unsupported. If this Court adopts it, the legal approach pressed by Young would be used by the abortion industry to press for abortion on demand and public funding of abortion under the same equal-protection theories.

ARGUMENT

I. THIS COURT SHOULD ADOPT UPS'S READING OF PDA

The parties offer rival possible interpretations of §701(k)'s first two sentences. As explained in this section, UPS's reading better aligns with not only Title VII's plain language but also the relevant canons of statutory construction. For that reason, the Court should reject Young's interpretation.

A. UPS's Reading of PDA Is the Better "Plain-Language" Reading

This Court should adopt UPS's argument that §701(k)'s criteria are cumulative with Title VII's other criteria, including the use of similarly-situated comparators to establish discrimination. At the same time, this Court must reject Young's argument that §701(k)'s criteria supplant the pre-PDA criteria for Title VII actions, which would entitle pregnant employees to the most-favorable accommodation that employers offer to any employee, regardless of other circumstances. There is no evidence that Congress intended PDA to create that form of entitlement.

In *Hardison*, this Court recognized that "[t]he emphasis of both the language and the legislative history of the statute [*i.e.*, §703(a)(1)] is on eliminating discrimination in employment" and that "similarly situated employees are not to be treated

differently solely because they differ with respect to race, color, religion, sex, or national origin." 432 U.S. at 71-72; *see also Manhart,* 435 U.S. at 705 n.5 (using similarly situated comparator to analyze Title VII claim); *Hazelwood,* 433 U.S. at 308 (same). By adding §701(k) into this framework, PDA simply added "because of pregnancy" into the definition of "because of sex" and supplemented the *existing* Title VII criteria with §701(k)'s new second-sentence criterion about the "ability or inability to work." That need not – and grammatically *does not* – remove the pre-existing criterion that required a comparison of similarly situated employees. It merely *adds* §701(k)'s criterion to disregard the physical state that *causes* the inability to work (*e.g.*, a pulled muscle, blood pressure, pregnancy),[5] without *removing* §703(a)(1)'s criterion that comparators be similarly situated. Were it otherwise, absurd results would follow:

> If [a company's Chief Executive Officer] receives company-provided transportation as an accommodation for a back injury, then so too must the pregnant mailroom clerk, merely because they have the same physical capability to work.

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[5] As indicated, UPS's reading does not rob §701(k)'s of all meaning; that criterion would prohibit distinctions between types of injuries or conditions and the types of treatments that the employee uses during their light-duty work.

UPS Br. at 45. Quite simply, nothing in either the statute or the legislative history explicitly instructs how to address multiple potential comparators.[6]

For her part, Young reads §701(k)'s second sentence to include the following emphasized additions: "***notwithstanding any other provision of law,*** women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as ***any*** other persons not so affected but similar ***only*** in their ability or inability to work." But even with the luxury of those added terms, her reading still does not resolve the issue presented here: what to do if more than one class of potential comparator exists? To be sure, Young would prefer comparators with the more generous benefits, but nothing in "other persons" or even "any other persons" compels that. She could just as consistently with that language get the person with the less-generous benefits.

Repeatedly and tautologically, Young's brief assumes that §701(k) mandates that pregnant employees receive the highest-level accommodation available to any other employee. *See, e.g.*, Young Br. at 20-21, 26, 29-30, 48-49. She then cites with approval excerpts from this Court's decisions that appear to support her outcome, but only if one first assumes her reading of §701(k). *Id.* at 20, 26. That form of circular reasoning proves nothing. Quite the

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[6] As explained in Section I.B, *infra*, the canons of statutory construction would not allow removing the well-understood Title VII criteria on the slender reed of PDA's revisions.

contrary, this Court's past PDA decisions do not expressly resolve this case.

B. Canons of Statutory Construction Support UPS's Reading of PDA

In this section, *amicus* Eagle Forum outlines four canons of statutory construction that undermine Young's reading of PDA and support UPS's reading. In her defense, Young offers primarily the canon against interpreting statutory text as mere surplusage. Young Br. at 23 (*citing Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459, 2468-69 (2014) and *Clark v. Rameker*, 134 S.Ct. 2242, 2248-49 (2014)).[7] As indicated in Section I.A, *supra*, UPS's reading of PDA does not render §701(k)'s second sentence surplus. Accordingly, Young's defense is no defense.

1. The Presumption against Preemption Supports UPS's Reading of PDA

As the enacting Congress recognized, the states already were regulating pregnancy-discrimination in employment when Congress enacted PDA. *See* S. REP. NO. 95-331, at 3 (quoted *supra*); H.R. REP. NO. 95-948, at 3 (quoted *supra*); *see also DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976) (states have occupied the general field of employment). In such fields

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[7] The canon against surplusage cuts both ways. If Congress had omitted §701(k)'s first sentence entirely and dropped its second sentence into an appropriate part of Title VII, Young's arguments would not change. In other words, §701(k)'s first sentence is surplusage as Young reads PDA.

traditionally occupied by state and local government, courts apply a presumption *against* preemption under which they will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Moreover, even where Congress plainly intended *some* preemption, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Federal courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). The "presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.; Santa Fe Elevator*, 331 U.S. at 230. The field here is plainly one of traditional state activity.

Under the circumstances, the presumption would prevent this Court's entertaining that interpretation to preempt state law if a non-preemptive or less-preemptive interpretation was also viable:

> When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.

Altria Group, Inc. v. Good, 555 U.S. 70, 77 (2008) (interior quotation omitted). Thus, while neither Eagle Forum nor UPS would concede that Young's interpretation *is* viable, that is not the test. The

burden is on Young to demonstrate that UPS's less-preemptive interpretation *is not* viable.[8]

2. The Canon against Repeals by Implication Supports UPS's Reading of PDA

As explained in Section I.A, *supra*, the entire pre-PDA process for enforcing Title VII's right to be free from employment discrimination required the use of similarly situated comparators to demonstrate discrimination. *Hardison*, 432 U.S. at 71-72. Given that the legislative history states emphatically that PDA "does not change the application of title VII to sex discrimination in any other way" than to "defin[e] sex discrimination, as proscribed in the existing statute to include" "pregnancy, childbirth, and related medical conditions," S. REP. NO. 95-331, at 3-4, Young's reading cannot survive the canon against repeals by implication.

As this Court has recognized, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (interior quotations omitted, alteration in original). Of course, that is the same skeptical, clear-and-manifest-intent standard used in the presumption

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[8] This Court already has held that PDA does not preempt state laws that are *more generous* than PDA, *California Fed'l Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 287-88 (1987), but that says nothing about state laws that were *less generous*, which PDA would supersede under the Supremacy Clause.

against preemption, which accepts plausible non-preemption readings over preemptive ones. *Altria Group*, 555 U.S. at 77. Similarly, "absent an expression of legislative will, [courts] are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision," such as *Hardison* and this Court's other pre-PDA Title VII decisions. *See Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 128 (1985). For these reasons, this Court should be reluctant to assume that Congress intended *sub silentio* to jettison the whole Title VII framework for comparing similarly situated employees when a viable alternate reading not only preserves that framework but also gives §701(k)'s second sentence meaning.

3. Young's Reading of PDA Impermissibly Relies on an Implied Private Right of Action, which this Court Has Rejected

Young's argument for enforcing §701(k)'s second sentence – separate and apart from a Title VII action under §703(a) – represents an impermissible attempt to revive this Court's former implied-right-of-action doctrine. As such, this Court should reject claims that Young can enforce §701(k)'s second sentence outside of the well-established process for enforcing Title VII under §703(a)(1).

In *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979), this Court rejected its prior practice of reading implied rights of action into statutes. Just as this Court decided in connection with another facet of the Civil Rights Act of 1964, it is too late in the day to argue for new implied rights of action:

"Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (declining to expand Title VI's existing implied right of action for statutory violations to include an action for regulatory violations); *cf.* Pet. App. 20a-21a (PDA's "shall be treated the same" language "does not create a distinct and independent cause of action"). For that reason, Title VII plaintiffs cannot enforce §701(k)'s second sentence outside of §703(a)(1).

4. The Canon of Constitutional Avoidance Supports UPS's Reading of PDA

As shown in Section II, *infra*, Young's reading of PDA would violate the Constitution by exceeding the power of Congress with respect to state governments. Under the circumstances, the canon of constitutional avoidance argues for rejecting Young's statutory reading to avoid the serious constitutional questions raised by Young's reading of PDA.

The canon of constitutional avoidance interprets statutes "to *avoid* the decision of constitutional questions" by "choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Suarez Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original), Here, the canon argues for rejecting Young's reading of PDA because that reading would exceed the powers of Congress.

II. YOUNG'S READING OF PDA VIOLATES THE CONSTITUTION

This Court should reject Young's reading of PDA because that reading would exceed the power of Congress under Article I and Section 5 of the Fourteenth Amendment, at least as applied to state-government employers. Although this action involves a *private* employer – and one that unquestionably is involved in interstate commerce – the canon of constitutional avoidance counsels against reading Title VII in a way that would be unconstitutional as applied to state employers.

By way of background, Congress can violate the Constitution by enacting not only "laws for the accomplishment of objects not entrusted to the government" but also those "which are prohibited by the constitution." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also U.S. v. Comstock*, 560 U.S. 126, 135 (2010) ("a federal statute, in addition to *being authorized* by Art. I, § 8, must also '*not [be] prohibited*' by the Constitution") (*quoting McCulloch*, 17 U.S. (4 Wheat.) at 421) (alterations in *Comstock*, emphasis added). As explained in this Section, Young's reading of PDA would exceed the power granted to Congress under both Article I and Section 5 of the Fourteenth Amendment.

Congress has two powers that *potentially* might authorize anti-discrimination provisions like PDA or Title VII: Section 5 of the Fourteenth Amendment

and the Commerce Clause.[9] *Bitzer*, 427 U.S. at 453 n.9 (Congress relied on §5 to extend Title VII to states in the 1972 amendments); *id.* at 458 ("Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause ... and in § 5 of the Fourteenth Amendment") (Brennan, J., concurring in judgment); *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726-27 (2003) (Congress relied on those two powers for the Family and Medical Leave Act). Neither of the two relevant powers supports applying Young's reading of PDA against states.

Although the 1978 PDA amendment likely could be justified as to UPS under the Commerce Clause, that Clause did not empower Congress to waive states' sovereign immunity for PDA's extension of Title VII to pregnancy-related discrimination. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635-36 (1999) ("Congress may not abrogate state sovereign immunity pursuant to its Article I powers"). As explained in this Section, the Fourteenth Amendment did not authorize Congress to extend PDA – as interpreted by Young – to the states, and EEOC's contrary interpretation cannot change that analysis. Instead, Young and the "urgings of feminist scholars" among her *amici*, *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994), are trying to raise the ERA, a fight that they lost more than thirty years ago.

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[9] The Spending Clause can support anti-discrimination laws like Title VI, but applies only to recipients of federal funds.

A. Congress Lacks the Authority under the Fourteenth Amendment to Impose Young's Reading of PDA

While "[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under [Section 5] of the Fourteenth Amendment," *Bitzer*, 427 U.S. at 453 n.9, there is an open question whether PDA – as read by Young and her *amici* – furthered any valid federal interest under Section 5.[10]

When Congress seeks to enforce the guarantees of the Fourteenth Amendment through Section 5, this Court has the ultimate obligation to determine whether Congress has overreached: "The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the

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[10] Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Young had the opportunity to prove UPS's requisite discriminatory intent *indirectly*. To do so, however, she needed to make out a *prima facie* case of discrimination, including a showing of UPS's differentially treating similarly situated comparators, the same showing that Young cannot make under a direct proof. As UPS explains, "PDA was enacted to overturn *Gilbert*, not *McDonnell Douglas*." UPS Br. at 56. If Young had made her showing, UPS could have shown that its rationales were not pretextual, providing an opportunity to rebut the social-science data cited by Young and her *amici*. By failing to make a *prima facie* case, Young denied UPS its rebuttal, and this Court should disregard data that have not survived evidentiary scrutiny. Especially in politicized fields, social-science data often are biased. *See, e.g., Lofton v. Sec'y of Dept. of Children & Family Serv.*, 358 F.3d 804, 825 (11th Cir. 2004).

province of the Judicial Branch." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000); *accord Hibbs*, 538 U.S. at 744 ("Congress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that guarantee") (Kennedy, J., dissenting). Although such legislation may be prophylactic in prohibiting or requiring conduct that the Fourteenth Amendment does not prohibit or require, "Section 5 legislation reaching beyond the scope of [the Fourteenth Amendment's] actual guarantees must be an appropriate remedy for identified constitutional violations, not an attempt to substantively redefine the States' legal obligations." *Hibbs*, 538 U.S. at 728 (interior quotations omitted). In deciding these issues, this Court "distinguish[es] appropriate prophylactic legislation from substantive redefinition of the Fourteenth Amendment right at issue" by requiring the legislation to "exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* (interior quotations and citations omitted). Young's reading of PDA cannot survive that analysis.

To determine whether Congress constitutionally imposed the Family and Medical Leave Act on the states, this Court "inquire[d] whether Congress had evidence of a pattern of constitutional violations." *Hibbs*, 538 U.S. at 729. In doing so, the *Hibbs* majority relied on this Court's elevated standard of review for claims of sex-based discrimination, *id.* at 730, which enabled the Court to see discrimination in the states' purported "rel[iance] on invalid gender

stereotypes in the employment context." *Id.* Under the Equal Protection Clause, however, *this case* is not a sex-discrimination case.[11]

Accordingly, what distinguishes this case from *Hibbs* (which upheld prophylactic legislation under Section 5) and instead groups it with cases like *Kimel* (which held such legislation invalid) is the level of scrutiny that the Equal Protection Clause affords to the protected class. *See Hibbs*, 538 U.S. at 735. Significantly, this case would involve the rational-basis level of scrutiny for pregnancy-related discrimination, *Geduldig v. Aiello*, 417 U.S. 484, 496-97 n.20 (1974), if indeed it were a pregnancy-discrimination case. Viewed as such for purposes of the Equal Protection Clause, it is clear that neither Young nor Congress provided any evidence of discrimination against pregnant women vis-à-vis others with off-the-job conditions that limit their ability to work.[12] Instead, as Young seeks to apply it,

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[11] Whereas *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995), overruled – for race discrimination – the suggestion in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 565-66 (1990), that "benign" classifications warrant less scrutiny, this Court should clarify that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual ... class." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (*citing Metro Broadcasting*, 497 U.S. at 602 (O'Connor, J., dissenting)) (Kennedy, J., concurring).

[12] In fact, this case involves discrimination against those with lifting restrictions, not pregnancy, which also would implicate the rational-basis test.

PDA would be a "preferential treatment mandate," Pet. App. 23a, not an anti-discrimination remedy:

> The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of the requisite link between any problem Congress has identified and the program it mandated.

Hibbs, 538 U.S. at 745 (Kennedy, J., dissenting). For that reason, this Court should reject Young's reading of PDA, unless employers would lack any rational basis for treating all off-the-job injuries and medical conditions alike.

Although a court reviewing the UPS policy under the rational-basis test would not be limited to issues raised by the parties, *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973), UPS here has provided ample rational for treating on-the-job injuries more generously that off-the-job injuries and conditions: "workforce continuity and ... assist[ance with] returning to their regular jobs as quickly as possible." UPS Br. at 54. Under the circumstances, there is no basis for Congress to impose Young's view of PDA on the states, and thus a significant reason for this Court to reject Young's reading under the canon of constitutional avoidance. *See* Section I.B.4, *supra*.

B. The United States Did Not Ratify the ERA, but Young's Reading of PDA Presupposes She Has Rights that Only the ERA Might Have Granted

The ERA provided the only possible basis for the federal authority that would allow Congress to enact the law that Young and her *amici* seek to enforce. But the states did not ratify the ERA, and "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Accordingly, the federal government lacks the authority to require what Young and her *amici* seek to enforce.

If the states had ratified it, the ERA would have supplemented federal anti-discrimination authority both substantively and procedurally. Substantively, the ERA would have provided that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." ERA §1. Just as importantly here, the ERA also would have mirrored the Fourteenth Amendment's Section 5 with the proviso that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." ERA §2. Of course, there is no telling how the Court would have read the

amendment into its constitutional jurisprudence because the states did not ratify the ERA.[13]

An influential law review article on the proposed ERA purported to cover all the amendment's possible consequences, including its impact on the area of pregnancy leave. *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women,* 80 YALE L.J. 871, 929-32 (1971). As this article showed, however, even the ERA might not have helped: "pregnancy was only a small part of the larger problem of temporary disabilities which could not constitutionally be dealt with separately," *id.* at 932, which suggests the same issue that UPS raises: leave (and thus light-duty accommodations) are part of a larger employment issue, thus requiring a larger fix. In the absence of that fix, the article suggests that an employer would be able to rely on the same types of distinctions that UPS makes (*i.e.*, off-duty injuries and conditions versus on-the-job injuries).

Amicus Eagle Forum respectfully submits that the reading that Young and her *amici* press *might* (or might not) have been viable under the ERA, but the states' failure to ratify the ERA dooms that reading under the Fourteenth Amendment that the states did ratify.

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[13] *Nat'l Org. for Women, Inc. v. Idaho,* 459 U.S. 809 (1982) (dismissing ERA-related ratification question as moot when the extended ratification period expired on June 30, 1982).

C. EEOC's Post-*Certiorari* Guidance Does Not Warrant this Court's Deference

This Court should deny deference to the EEOC's *post hoc* guidance because the guidelines: (1) are inconsistent with the federal power under the Constitution, *see* Section II, *supra;* (2) do not align with the statute's text or history, *see* Sections I.A, I.B.2, *supra;* and (3) reflect an inconsistent federal position on the legal point at issue here. *See* UPS Br. at 15-20. While reasonable EEOC guidelines are entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), *see* U.S. *Amicus* Br. at 26, the guidelines here are not reasonable.

Consistency of interpretation can increase deference, *Skidmore* 323 U.S. at 140, and any inconsistency can decrease or nullify it. *Id.; Morton v. Ruiz,* 415 U.S. 199, 237 (1974). On the other hand, consistency alone cannot make an arbitrary position rational. *Judulang v. Holder,* 132 S.Ct. 476, 488 (2011) ("[a]rbitrary agency action becomes no less so by simple dint of repetition"). Thus, whatever deference Young claims for EEOC's present position, the primary issue is whether that position is consistent with Title VII and federal authority. For the reasons explained in this brief, EEOC's position is untenable.

III. ALTHOUGH YOUNG AND HER *AMICI* RELY ON POLICY ARGUMENTS – NOT LEGAL ARGUMENTS – TO SUPPORT THEIR READING OF PDA, THAT READING WOULD BE BAD POLICY

As UPS explains, Young and her *amici* rely on policy arguments about what the law *should be,* not

legal arguments about what the law *is*. UPS Br. at 12-25. Indeed, as *amicus* Eagle Forum explains, their view of what the law should be is not even something that the law constitutionally *could be*. *See* Section II, *supra*. In any event, because Young and her *amici* have raised policy issues about not only her position on PDA but also the dubious claim that Young's position is the pro-life position with respect to abortion, they should not go without rebuttal.

A. Young's Reading of PDA Would Harm American Families

The reading of PDA put forward by Young and her *amici* would harm American families, which is not the result that Congress intended in 1978. Quite simply, the accommodation Young requested is not good policy, which is why Congress did not require it.

In enacting PDA, Congress never intended: (1) to eliminate stereotypes of husband-breadwinner, wife-homemaker families; (2) to have women return to work immediately after giving birth to the exclusion of caring for their newborns; (3) to have pregnant women work as package-delivering truck drivers; or (4) to privilege the status of female truck drivers over either male truck drivers or the women married to male truck drivers. While the eradication of typical – or even stereotypical – families was the goal of the feminist movement, Congress generally has taken the more moderate path advocated by UPS here.

By contrast, Young demands that UPS provide her with light duty for *nine months* when typical on-the-job light duty lasts *a month*, UPS Br. at 55; J.A. 254, 569, so that she continues to draw her high pay while forcing her predominantly male coworkers –

who support their own spouses and children – to do the heavy lifting. It insults pregnancy to characterize this situation as pregnancy discrimination. As explained in Section II.A, *supra*, Young's demand for preferential treatment lacks a rational relationship to any legitimate anti-discrimination purpose that Congress may have had in 1978. Moreover, as explained in Sections II.A-II.B, *supra*, her demands exceed the constitutional powers of Congress given the failure of the ERA.

At all times relevant to this action, Young herself was married to a man whose job provided medical insurance. Nonetheless, much of the advocacy and data submitted to this Court press the concerns of single women who work and want to have children. *See, e.g.*, U.S. Amicus Br. at 23-24. If PDA did allow women like Young and similarly situated single women to impose their pregnancies on coworkers, PDA might provide enough of a cushion for Young, but it would leave similarly situated single women short, once their children were born. Facilitating single motherhood out of strained sense of equality does not do the women or the children a significant or long-lasting favor:

> Throughout human history, a single woman with a small child has not been a viable economic unit. Not being a viable economic unit, neither have the single woman and child been a legitimate social unit. In small numbers, they must be a net drain on the community's resources. In large numbers, they must destroy the community's capacity to sustain itself. *Mirabile dictu*, communities

> everywhere have augmented the economic penalties of single parenthood with severe social stigma.

Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, *reprinted in Welfare Reform: Hearings Before the Subcommittee on Social Security & Family Policy of the Senate Committee on Finance*, 103rd Cong. 179, 181 (1994). The charitable purpose that some legislators may have had in PDA would be misplaced if PDA encouraged a single woman to bear children whom she cannot support.

The women's-rights group *amici* make an explicit the appeal to "this Court's longstanding commitment to gender equality," Women's Right Org. Br. at 3, an appeal that is implicit in all of the briefs supporting Young. The concept of "equality," however, is not the traditional sense of uninhibited opportunity or non-discrimination inherent in our legal tradition. Instead, this form of "gender equality" or "gender equity" means women as a group should earn as much as men and have equal representation in any desirable jobs, even (as here) when they cannot perform all the functions and duties of the job. While on the Ninth Circuit, Justice Kennedy addressed the strand of this theory that calls for comparable-worth payments to females in lower-paying jobs, based on their comparison with higher-paying jobs in which men predominate. "Neither law nor logic deems the free market system a suspect enterprise," and "Title VII does not obligate [an employer] to eliminate an economic inequality that it did not create." *Am. Fed'n of State, County & Muni. Employees, AFL-CIO v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985)

(Kennedy, J.). Young's case, in short, is based "upon an economic theory which a large part of the country does not entertain." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). "The Fourteenth Amendment does not enact" feminist theory, *id.*, and this Court should reject Young's reading of PDA as such.

Although congressional social engineering often proves disastrous for even the intended beneficiaries, Charles Murray, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (Thomas, J., concurring). For that reason, even if helping pregnant truck drivers seems noble or enlightened, the Nation will be better off if this Court stays its hand to allow the private sector and state governments to act in this arena, as UPS already has. This Court should reject the call to act out of equity in a field that this Court lacks not only the expertise but also the resources to manage.

B. Young's Reading of PDA Would Undermine Pro-Life Policies and Laws

As problematic as Young's PDA positions are as a matter of social policy, the position of her pro-life *amici* are even worse. *See Amicus* Br. of 23 Pro-Life Organizations at 20. Based on three brief statements in the legislative debates to the effect that PDA would provide women flexibility to carry their pregnancies to term, these *amici* throw their support behind an expansion of the concept of pregnancy-related discrimination that would greatly increase the abortion industry's ability to argue for abortion

on demand and public subsidization of those abortions. The brief has three principal flaws.

First, the brief subscribes to the incorrect view that preventing the economic coercion of abortions was "the very problem that Congress sought to solve." *Id.* at 10. While the few legislators who mentioned this facet included Rep. Hawkins and Sen. Williams, the floor statements of even bill managers do not bind Congress to a position unsupported in the bill. Even when made by bills' sponsors, floor statements lack controlling effect and – when (as here) inconsistent with the statutory language – do not even provide evidence of congressional intent. *Brock v. Pierce County*, 476 U.S. 253, 262-63 (1986). Moreover, to the extent that PDA's legislative history actually addressed abortion, it concerned the extent to which employers could decline to include abortion coverage as a health-insurance benefit. H.R. REP. NO. 95-1786, at 3-4 (Oct. 13, 1978) (Conference Report).

Second, aside from those hyperbolic claims in seeking the votes of pro-life legislators, no evidence exists, then or now, that PDA either was intended to discourage abortions or, in fact, did reduce abortions. Nor do *amici* cite any evidence to support their claim. Contrary to this unsupported claim, the interpretation that Young and her *amici* press would promote abortion by adopting legal arguments that true equality requires relieving women from the burdens of pregnancy and childcare, which likely would include not only unrestricted abortion on demand, but also requirements for public funding and mandating abortion coverage in health care

plans. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2787-89 (2014) (Ginsburg, J., dissenting). If abortion becomes a gender-equity issue – rather than one of privacy or liberty – the abortion industry obviously would press that right. Finally, inclusion of abortion among the pregnancy-related medical conditions protected by PDA would dwarf the few instances, if any, where PDA leave or benefits enabled a woman to bring a child to term that she otherwise would have aborted.

Third, although Young herself was married when the underlying facts unfolded, the position pressed by Young and her *amici* also extends to single working mothers. For both married women like Young and especially for single mothers, neither this Court nor this Nation have ever recognized a "fundamental right to bear children while also participating fully and equally in the workforce." *Amicus* Br. of 23 Pro-Life Organizations at 23 (*citing* 123 Cong. Rec. 29,658 (1977) (statement of Sen. Williams) and *Guerra*, 479 U.S. at 288-89) (interior quotations and alternation omitted). Senator Williams – as quoted in Guerra – should not be construed to mean that women can "have it all" through some "fundamental right" to avoid the inevitable tradeoffs between work and family life. Life is a series of tradeoffs, and "you can have it all" does not mean "having it all given to you." While this Court should not have restated Sen. Williams' floor-

speech hyperbole,[14] *Guerra*, 479 U.S. at 288-89, that restatement on the "entire thrust" behind PDA did not create any such right. If it existed, that supposed right would be a right to be supported by others or by the government. While our Constitution may forbid the government from *interfering in the exercise* of such freedoms, the Constitution offers no such privileges outright.

CONCLUSION

This Court should affirm the Fourth Circuit.

October 31, 2014

Respectfully submitted,

LAWRENCE J. JOSEPH
1250 Connecticut Av. NW
Suite 200
Washington, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus

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[14] PDA's thrust was to end pregnancy-based discrimination for women who – unlike Young – are able to perform their jobs as well as required of similarly situated coworkers.

AMICUS CURIAE BRIEF

No. 12-1226

Supreme Court, U.S.
FILED
OCT 31 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

KAREN HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae* Equal Employment Advisory Council and Society for Human Resource Management

October 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 12-1226

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center, and Society for Human Resource Management respectfully submit this brief *amici curiae* in support of the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

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amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and the United Arab Emirates.

Many of *amici's* members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As potential defendants to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in whether and to what extent Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k), provides a right to workplace accommodations on the basis of pregnancy and related medical conditions.

As national representatives whose memberships include many professionals who are responsible for compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC, NFIB and/or SHRM have participated as *amicus curiae* in hundreds of cases before this Court and the federal courts of appeals, many of which have involved Title VII questions. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the

business community and the significance of this case to employers generally.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits workplace discrimination on the basis of race, color, religion, sex or national origin. In response to this Court's ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125, 136 (1976), Congress enacted the Pregnancy Discrimination Act (PDA) to clarify that the term "because of sex" includes discrimination on the basis of "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). In doing so, Congress merely confirmed that under Title VII, discrimination because of pregnancy, childbirth or related conditions constitutes unlawful discrimination "because of sex."

The Fourth Circuit below therefore was correct in holding that Title VII, as amended by the PDA, does not impose an affirmative obligation on employers to provide *preferential* workplace accommodations solely on the basis of pregnancy, but rather mandates that women affected by pregnancy and related conditions be treated the same as non-pregnant peers, without regard to pregnancy status. Any other construction would contravene the statute's plain text, purposes and intent, and thus should be rejected by this Court.

Although Title VII already imposed on employers an affirmative obligation to reasonably accommodate the sincerely-held religious beliefs of their employees, *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), Congress elected not to incorporate such a requirement into the PDA. Indeed, both the plain text of the PDA and its legislative history are devoid of any reference to an affirmative obligation to provide

workplace accommodations, or any suggestion that women affected by pregnancy and related conditions are to be accorded preferential treatment under Title VII. For that reason, no federal court of appeals has accepted Petitioner's contention that the PDA imposes an affirmative duty on employers to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers similar in ability or inability to work.

As this Court observed in *California Federal Savings & Loan Association v. Guerra*, the PDA was designed to establish "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." 479 U.S. 272, 285 (1987) (citation and internal quotation omitted). In fact, a number of states have gone beyond the PDA's nondiscrimination protections by enacting laws that impose an affirmative duty on covered employers to provide workplace pregnancy accommodations. Federal legislation also has been introduced and currently is pending in Congress that would make it unlawful for an employer to refuse to provide reasonable accommodations "to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee, unless doing so would impose an undue hardship. H.R. 1975, 113th Cong. (2013) at Sec. 2.(1).

Were it true that the PDA already mandates pregnancy accommodations, there would be no need for new laws, either at the state or the federal level, imposing such obligations on employers. The fact that a number of state legislatures and Congress are considering laws that would require workplace reasonable accommodations on the basis of pregnancy and related conditions calls into serious question

Petitioner's contention that such an obligation already exists under the PDA.

Petitioner's construction of the PDA is further undermined by the fact that, unlike other workplace accommodation laws, it does not contemplate any restrictions on the scope of an employer's duty to accommodate pregnant workers. If this Court were to accept Petitioner's view of the PDA, employees who are affected by pregnancy or related conditions would be elevated to a "super-protected" legal status, entitled not only to nondiscriminatory treatment, but to far superior treatment than entire classes of other protected persons.

Both the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, and Title VII's religious discrimination provision, 42 U.S.C. § 2000e(j), require, for instance, that employers implement workplace accommodations that are both reasonable and effective, but only to the extent that doing so would not impose an undue hardship on business operations. Of particular note, in the Title VII religion context, any accommodation that would impose more than a *de minimis* burden constitutes undue hardship. *See Hardison*, 432 U.S. at 84 (footnote omitted).

Petitioner's construction of Title VII, which does not contemplate *any* restrictions or limitations on the right of pregnant workers to workplace accommodations, effectively would allow those employees, as a class, to move to the front of the line for special treatment – a result plainly at odds with the PDA's aim to ensure *equal* treatment.

The EEOC lacks the authority to promulgate substantive regulations interpreting Title VII, and only may issue "suitable *procedural* regulations" as

required to administer the Act. 42 U.S.C. § 2000e-12(a) (emphasis added). Accordingly, the EEOC's interpretations of Title VII are not entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the agency's views may be entitled to some measure of respect under *Skidmore v. Swift*, 323 U.S. 134 (1944), but only insofar as they are persuasive.

The EEOC's very recently revised enforcement guidance on pregnancy accommodations purports to impose an affirmative obligation to provide pregnancy-related workplace accommodations to the same extent as are provided to non-pregnant workers "similar in their ability or inability to work." EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* at I.A.5 (July 2014). Because such an interpretation is inconsistent with the plain text of Title VII, as well as the agency's own regulations and longstanding policy interpretations, it is entirely unpersuasive and thus not entitled to any judicial deference.

The EEOC never before, in either its sex discrimination regulation or sub-regulatory guidance, has purported to impose an affirmative obligation on employers to ensure that *all* pregnant employees with work restrictions are accommodated, as long as any other non-pregnant employee, for whatever reason, is provided a similar accommodation. The absence of any such reference in the sex discrimination context is especially stark in light of the fact that the EEOC's religious discrimination regulation explicitly describes, in detail, a covered employer's obligation under Title VII to provide workplace *religious* accommodations to the point of undue hardship.

Because the text and structure of its sex and religion regulatory provisions confirm that the EEOC traditionally has interpreted the PDA as mandating equal, not preferential, treatment, the agency's new policy views as expressed in its recent enforcement guidance are unpersuasive and thus not entitled to *Skidmore* deference.

ARGUMENT

I. INTERPRETING THE PDA TO IMPOSE AN AFFIRMATIVE PREGNANCY ACCOMMODATION REQUIREMENT WOULD CONTRAVENE TITLE VII'S PLAIN TEXT, PURPOSE AND AIMS

This is not a case about unlawful pregnancy discrimination. Petitioner was not discriminated against "because of" pregnancy or a related condition. Rather, she was denied a "light duty" work assignment. Under Respondent's policy at the time, alternative work assignments would be considered for three, facially-neutral categories of employees: those (1) with an actual disability as defined by the Americans with Disabilities Act, (2) who suffered a work-related injury, or (3) who experienced the loss of a Department of Transportation (DOT) driver certification. Because Petitioner failed to qualify for an alternative work assignment under one of those categories, she was not entitled to be placed in a light duty job.

Left without the basis for a traditional discrimination claim, Petitioner urges this Court to construe Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA), as imposing an affirmative obligation on employers to provide workplace accommodations – such as light duty – to those affected by pregnancy or related

conditions, as long as they do so for any other employee not so affected. Title VII, however, does not go that far. Inasmuch as such an interpretation is inconsistent with the text, meaning, and purposes of Title VII, it is erroneous and should be rejected by this Court.

A. As Amended By The PDA, Title VII Provides That Discrimination Because Of Pregnancy Or Related Conditions Constitutes Unlawful Discrimination "Because Of Sex"

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in the terms, conditions and privileges of employment on the basis of sex. In *General Electric Co. v. Gilbert*,[2] this Court ruled that exclusion of pregnancy from a disability benefits plan was "not gender-based discrimination at all." Congress enacted the Pregnancy Discrimination Act (PDA) of 1978, 42 U.S.C. § 2000e(k), directly in response to *Gilbert*, amending Title VII's definition of discrimination "because of sex" to include discrimination on the basis of "pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). The PDA also mandates equal treatment of those so affected with respect to the "receipt of benefits under fringe benefit programs." *Id.* Thus, as amended by the PDA, Title VII proscribes treating a woman differently than a non-pregnant person similar in his or her ability to work *because of* pregnancy or a related condition.

Although the PDA requires employers to treat women "affected by pregnancy, childbirth, or related

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[2] 429 U.S. 125, 136 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

medical conditions" the same as other employees in all aspects of employment – including the provision of health insurance and other benefits – it stops short of imposing an affirmative duty on employers to provide pregnancy-related workplace accommodations to the extent that they are not offered categorically to all other employees. *Id.*

1. Section 2000e(k) does not contain a workplace accommodations requirement, even though adjacent Section 2000e(j) does impose such a duty with respect to religion

Section 2000e(k) provides, in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

42 U.S.C. § 2000e(k). The plain text of Section 2000e(k) mandates equal treatment as compared to other non-pregnant persons similarly situated; it does not require that pregnant women be treated the same as (or better than) *all* other persons. Indeed, conspicuously absent from the definition is any reference to an affirmative obligation to provide workplace accommodations, or any suggestion that women affected by pregnancy and related conditions are to be accorded preferential treatment under Title VII.

In contrast, the definition of "religion" – situated just above the PDA-revised definition of sex – does require that reasonable accommodations be made for conflicts between an individual's job responsibilities and sincerely-held religious beliefs. In 1972, Congress amended Title VII to provide that the term "religion" "includes all aspects of religious observance and practice, as well as belief, *unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*" 42 U.S.C. § 2000e(j) (emphasis added); *see also Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). As this Court has explained, "The intent and effect of this definition was to make it an unlawful employment practice under § 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74.

Though it amended Section 2000e(k) just six years after adopting the current definition of "religion," Congress chose not to include any language specifying a right to workplace accommodations on the basis of pregnancy and/or related conditions. Nevertheless, Petitioner and her *amici* are steadfast in their view that on its face, Title VII requires that workplace accommodations, such as light duty, be made available to any pregnant worker needing an accommodation, so long as even one other non-pregnant person receives the accommodation. *Amicus* United States contends, for instance, that "when an employer can and does accommodate work limitations for some nonpregnant employees, it must extend the same accommodations to pregnant employees who are similarly limited in their ability to work." Brief for the United States as

Amicus Curiae Supporting Petitioner at 21-22. It goes on to argue:

> The court of appeals elsewhere recognized that respondent's collective bargaining agreement places a heightened obligation on respondent to accommodate employees injured on the job. Title VII places the same "heightened obligation" on respondent to offer the same accommodation to pregnant employees who are similar in their ability or inability to work.

Id. at 22 (citation omitted).

That interpretation simply does not comport with the actual text of Section 2000e(k). "The second problem with this reading is its inconsistency with the design and structure of the statute as a whole. Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, __ U.S. __, 133 S. Ct. 2517, 2529 (2013) (citations omitted). Because Congress did not incorporate into the PDA, as it did elsewhere, a right to workplace accommodations, an employer does not violate the Act by refusing to provide such accommodations for non-discriminatory reasons.

2. Efforts currently are underway to enact complementary federal pregnancy accommodations legislation

Petitioner's interpretation of Title VII is particularly questionable when considered in light of legislation currently pending in Congress that would impose an affirmative obligation on employers to provide workplace accommodations to pregnant workers. The so-called Pregnant Worker's Fairness Act (PWFA) was first introduced in 2012 with the strong backing of

over 100 women's and civil rights advocacy organizations, including A Better Balance, the Equal Rights Advocates, and the National Partnership for Women and Families.[3] The sponsors at the time described PWFA as "critical new legislation" to prevent pregnant women from being forced out of jobs or being denied "reasonable job modifications" that would enable them to continue working while pregnant. Press Release, Rep. Jerrold Nadler, *Reps. Nadler, Maloney, Speier, Davis & Advocates Announce Legislation Protecting Pregnant Workers from Discrimination* (May 8, 2012).[4]

Patterned after the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, the PWFA would make it unlawful for an employer to refuse to provide reasonable accommodations "to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an applicant or employee, unless doing so would impose an undue hardship. H.R. 5647, 112th Cong. (2012) at Sec. 2.(1). The terms "reasonable accommodation" and "undue hardship" would have the same meaning as, and be interpreted consistent with, the ADA. *Id.* at Sec. 5.(5). The PWFA would be enforced by the Equal Employment Opportunity Commission (EEOC), which in addition to promulgating suitable regulations would be required to provide examples of pregnancy-related workplace accommodations sufficient to address "known limitations related to pregnancy, childbirth, or related medical conditions." *Id.* at Sec. 2.(1).

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[3] S. 3565 and H.R. 5647, 112th Cong. (2012). Reintroduced as S. 942 and H.R. 1975, 113th Cong. (2013).

[4] *Available at* http://nadler.house.gov/press-release/reps-nadler-maloney-speier-davis-advocates-announce-legislation-protecting-pregnant (last visited Oct. 29, 2014).

If, as Petitioner and her *amici* insist, Title VII already requires employers to make "reasonable job modifications" and other workplace accommodations for pregnant workers who need them, there would be no need for new federal legislation establishing such an obligation. Nor would there be such a concerted effort to enact new pregnancy accommodations laws at the state level.

3. States have gone beyond the PDA's nondiscrimination protections by enacting specific workplace pregnancy accommodations laws

Although federal law does not currently mandate the practice, a number of states have enacted laws requiring the provision of workplace accommodations on the basis of non-disability related pregnancy or related conditions. *See, e.g.*, Cal. Gov't Code § 12945; Conn. Gen. Stat. § 46a-60(a)(7); La. Rev. Stat. § 23:342; Minn. Stat. § 363A.08(6); N.J. Stat. § 10:5-12(s). Since 1999, for instance, California has required employers with five or more employees to provide pregnancy-related workplace reasonable accommodations upon an employee's request. Cal. Gov't Code § 12945. The law specifies that employers must temporarily transfer a pregnant worker "to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated." *Id.*

Similarly, the West Virginia Pregnant Workers' Fairness Act makes it unlawful for a covered employer to, among other things, not make pregnancy-related reasonable accommodations or force an employee to accept an accommodation not of her choosing – such as

placement on an involuntary leave of absence. W. Va. Code § 5-11B-1 *et seq.* The West Virginia PWFA is virtually identical to the federal PWFA.

In a June 2014 report entitled, *Expecting Better: A State-by-State Analysis of Laws That Help New Parents*, the National Partnership for Women & Families (NPWF) pointed to several "shortcomings" of the PDA, including that "some courts" have held that it does not require workplace reasonable accommodations.[5] Highlighting the decision by the Fourth Circuit below, the NPWF asserts that "[t]his decision, and numerous other complaints from pregnant women across the country, has given rise to new momentum *to pass pregnancy accommodation laws federally and at the state and local levels.*" *Id.* at 13 (emphasis added). These state-level efforts to adopt workplace pregnancy accommodations laws further undermine Petitioner's claim that Title VII already provides the right to pregnancy accommodations.

B. This Court's Title VII Jurisprudence Confirms The Limited Scope Of The PDA

This Court observed in *California Federal Savings & Loan Association v. Guerra* that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." 479 U.S. 272, 285 (1987) (citation and internal quotation omitted). It confirmed that unlike some, more generous state laws, the main purpose of the PDA was to ensure that women are not subjected to discriminatory employment practices

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[5] Nat'l P'ship for Women & Families, *Expecting Better: A State-by-State Analysis of Laws That Help New Parents* at 13 (3d ed. June 2014).

because of pregnancy, childbirth or related medical conditions. The PDA was not intended to create any new entitlements for pregnant workers or, as the Fourth Circuit below observed, to confer upon them "'most favored nation' status with others based on their ability to work, regardless of whether such status was available to the universe – male and female – of nonpregnant employees." Pet. App. 19a.

The question presented in *Guerra* was whether Title VII, as amended by the PDA, "preempts a state statute that requires employers to provide leave and reinstatement to employees disabled by pregnancy." *Id.* at 272. Concluding that it does not, the Court observed, "The purpose of Title VII is to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of employees over other employees." *Id.* at 693 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971)) (internal quotation omitted). To the extent that the California law simply builds upon the nondiscrimination protections afforded by the PDA, the Court concluded that it merely complements, rather than conflicts with, Title VII.

In resolving that question, the Court explained that Congress's intent in enacting the PDA was to confirm that discrimination because of pregnancy is unlawful, not to mandate special treatment for pregnant workers:

> In contrast to the thorough account of discrimination against pregnant workers, the [PDA's] legislative history is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgments of the existence of state statutes providing for such preferential treatment. Opposition to the PDA came from those concerned with

> the cost of including pregnancy in health and disability-benefit plans and the application of the bill to abortion, not from those who favored special accommodation of pregnancy.

Guerra, 479 U.S. at 285-86; *see also Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991) (the legislative history of PDA "confirms what the language of the PDA compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children").

Thus, as this Court's prior rulings confirm, the limited scope and straightforward intent of the PDA compel the conclusion that the pregnancy accommodations Petitioner seeks in this case are unavailable to her under Title VII.

II. READING AN AFFIRMATIVE ACCOMMODATION OBLIGATION INTO THE PDA WOULD ELEVATE THOSE AFFECTED BY PREGNANCY AND RELATED CONDITIONS TO "SUPER-PROTECTED" STATUS

Unlike other workplace accommodation laws, Petitioner's construction of the PDA does not contemplate any restrictions on the scope of an employer's duty to accommodate pregnant workers. As such, it elevates employees who are affected by pregnancy or related conditions to a "super-protected" legal status, entitled not only to nondiscriminatory treatment, but to far superior treatment than entire classes of other protected persons.

The Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, for instance, requires that reasonable accommodations be made to the known disabilities of qualified individuals with disabilities unless doing so would impose an undue hardship on business operations. 42 U.S.C. § 12112(b)(5)(A). An individual with a disability is qualified if he or she can perform the essential functions of the job with or without reasonable accommodation.

If no reasonable accommodation would enable the individual with a disability to perform the essential functions of the position, then he or she is not "qualified" for ADA purposes. 42 U.S.C. § 12111(8). Thus, if the ability to lift fifty pounds waist to shoulder is an essential function of a particular job, an individual who is unable to perform that essential function even with reasonable accommodation is not "qualified" for ADA purposes. *Id.* Even where an accommodation that is both reasonable and effective is identified, the employer is under no legal obligation to offer it if doing so would impose an undue hardship. Nor must an employer place or retain an individual in a position if doing so would pose a "significant risk" of harm to that person or to others. 42 U.S.C. § 12111(3).

As is the case under the ADA, Title VII requires employers to make reasonable accommodations to an individual's sincerely-held religious beliefs where they conflict with a work requirement, but only to the extent that doing so would not impose an undue hardship. 42 U.S.C. § 2000e(j). In the religion context, this Court has held that any accommodation that would impose more than a *de minimis* burden constitutes undue hardship. *See Hardison*, 432 U.S. at 84 (footnote omitted).

As noted, unlike a number of state laws and federal legislation currently pending in Congress, Title VII does not impose an affirmative obligation on employers to provide workplace accommodations due to non-disabling pregnancy and pregnancy-related conditions. Under Petitioner's construction of the statute, however, employers would be obligated to provide such accommodations whenever a non-pregnant worker who is "similarly" able or unable to perform his job receives workplace accommodations – whether by virtue of the employer's ADA obligations, the terms of a collective bargaining agreement or, as here, a facially neutral and nondiscriminatory employment policy. Worse still, under that interpretation, employers would have to provide the requested accommodation whether or not it is "reasonable" or would impose an undue hardship on the employer's business operations, since the PDA's purported accommodations mandate does not contain those, or any other, functional limitations. As a result, pregnant women would be entitled to leapfrog ahead of entire classes of employees who unquestionably are entitled to workplace accommodations, subject only to the "similar in ability" language noted above. Such a construction is at odds with Title VII's aim to ensure equal treatment, regardless of sex (including pregnancy).

As one EEOC Commissioner pointed out, such an interpretation:

> [A]llows pregnant employees to bypass the requirements of a qualified individual with a disability under the ADA, *thus elevating [them] to a kind of super-status above that of individuals with disabilities. This dilutes the significance of reasonable accommodations and the rights of individuals with disabilities under the ADA.* That

> is an insult to the disability community and their years of working for legislation that ensured them the reasonable accommodations that they are now entitled to receive by law.

Public Statement of Commissioner Constance A. Barker, U.S. EEOC (July 14, 2014) (Mem. Attach. at 2).[6] The same would be true for those entitled to religious accommodations under Title VII.

As noted, the PDA does not contain an undue hardship or any other defense to failing to provide a requested pregnancy accommodation.[7] Thus, as a practical matter, no employer would be able to avoid providing workplace accommodations on the basis of pregnancy or related conditions – such as infertility, abortion, and the like – to any woman requesting them under the PDA, so long as a single ADA or Title VII religion-based reasonable accommodation is made anywhere within the company.

For instance, if an employer excuses an employee from mandatory overtime as a religious accommodation, under Petitioner's interpretation of the PDA, a pregnant worker who is "similar in her ability or inability to work" likewise would be entitled to no overtime as an accommodation. Or if a qualified individual with a disability is permitted (as a result of extreme fatigue associated with the effects of new epilepsy medication) to begin his work shift one hour later than scheduled for a four-week period, the pregnant worker who is similarly affected by fatigue

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[6] *Available at* http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf (last visited Oct. 29, 2014).

[7] Both the proposed PWFA, as well as most state statutes, do place reasonable restrictions on the right to pregnancy accommodations, however.

(and thus similarly unable to make it to work on time) categorically would be entitled to the same accommodation under Petitioner's rationale.

Because a purported right to pregnancy accommodations would not operate in harmony with an employer's obligation to provide reasonable accommodations under either Title VII's religious discrimination provision or the ADA, it is improper, and makes little practical sense, to read such a right into the statute.

III. THE EEOC'S JULY 2014 SUBREGULATORY ENFORCEMENT GUIDANCE ON PREGNANCY ACCOMMODATIONS IS NOT ENTITLED TO JUDICIAL DEFERENCE

On July 14, 2014, the EEOC published its *Enforcement Guidance on Pregnancy Discrimination and Related Issues*,[8] in which it asserts that under the PDA, an employer must provide workplace accommodations to women on the basis of pregnancy or related medical conditions to the same extent as it provides accommodations to other workers who are "similar in their ability or inability to work." *Id.* at I.A.5. Specifically in the context of light duty work, the EEOC "rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities" under the ADA, *id.* at I.C.1.c., a position directly at odds with the decision below and contrary to decisions of every

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[8] *Available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Oct. 29, 2014).

federal appeals court to have decided the issue. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Elam* v. *Regions Fin. Corp.*, 601 F.3d 873, 878 (8th Cir. 2010); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1191 (10th Cir. 2000); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998).

The EEOC thus asserts that an employer may not deny a requested "light duty" pregnancy accommodation on the ground that light duty assignments are reserved only for those with ADA-qualifying disabilities or on-the-job injuries. EEOC, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* at I.C.1.c. (July 2014). In particular, "if a pregnant worker requests a change that the employer is providing as a reasonable accommodation to a co-worker with a disability, the employer may evaluate the pregnant employee's request in light of whether the change would constitute an 'undue hardship', since this would amount to treating the pregnant employee the same as an employee with a disability whose accommodation request would also be subject to the defense of undue hardship." *Id.* at I.A.5. (footnote omitted).

This is the very argument that the Fourth Circuit rejected below. Rather than wait for this Court's ruling, the EEOC inexplicably has adopted the policy view that to the extent an employer provides even *one* workplace reasonable accommodation such as light duty to an individual with a disability under the ADA, it therefore is obligated under Title VII to do the same with respect to women who are pregnant or affected by pregnancy-related conditions.

Congress intentionally declined to confer upon the EEOC substantive rulemaking authority under Title VII. Instead, it authorized the agency "to issue, amend, or rescind suitable procedural regulations" as required to administer the Act. 42 U.S.C. § 2000e-12(a). Accordingly, the EEOC's interpretations of Title VII are not entitled to controlling deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).[9] Rather, they are entitled to some measure of respect under *Skidmore v. Swift*, 323 U.S. 134 (1944), but only to the extent that they are persuasive.

A. The EEOC's Recent Guidance Is Not Entitled To *Skidmore* Deference, Because It Is Inconsistent With The Agency's Own Regulations And Long-standing Interpretations Of The PDA

In *Skidmore v. Swift*, this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts

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[9] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established the fundamental framework for analyzing certain situations in which a party challenges a federal agency's construction of a statute. Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Where such is not the case, the *Chevron* framework does not apply, and the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Id.* at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

and litigants may properly resort for guidance." 323 U.S. 134, 140 (1944). In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citation omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *see also Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other." *Mead*, 533 U.S. at 228 (citations omitted).

1. Unlike the religious accommodations provision that immediately follows it, the EEOC's sex discrimination regulation does not interpret Title VII to impose an affirmative duty to accommodate

The EEOC suggests that its purpose in publishing the new guidance simply is to reaffirm the agency's longstanding view that Title VII entitles pregnant employees to workplace accommodations to the same extent as are provided to non-pregnant employees who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Never before, however, has the EEOC purported to impose an affirmative obligation on employers to ensure that *all* pregnant employees with work restrictions are accommodated, as long as

any other non-pregnant employee, for whatever reason, is provided a similar accommodation.

The EEOC's sex discrimination regulation, which was amended after the PDA's enactment, certainly does not go that far, and in fact is silent regarding any affirmative duty to accommodate pregnancy unless doing so would impose an undue hardship. The regulation provides, in relevant part:

> **Employment policies relating to pregnancy and childbirth.**
>
> (a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.
>
> (b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were

> carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

29 C.F.R. § 1604.10(a), (b); *see also* App. to Part 1604, *Questions and Answers on the Pregnancy Discrimination Act*, Pub. L. No. 95-555, 92 Stat. 2076 (1978). The EEOC's regulation is devoid of any language requiring pregnancy-related workplace accommodations, which strongly suggests that the agency's longstanding interpretation of the PDA has been, until recently, that Title VII stops short of doing so.

Although the EEOC's pregnancy discrimination regulation does not impose a workplace accommodation obligation on employers, such an obligation is expressly set out in the adjacent regulation on religious discrimination:

> (a) Purpose of this section. This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, to accommodate the religious practices of employees and prospective employees. ... The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination *in all circumstances other than where an accommodation is required.*

29 C.F.R. § 1605.2(a) (emphasis added). The regulation goes on to specify that Title VII "makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective

employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b) (footnote omitted).

The text and structure of its sex and religion regulatory provisions confirm that the EEOC traditionally has interpreted the PDA as mandating equal, not preferential, treatment. To the extent that the EEOC's new subregulatory enforcement guidance is inconsistent with the agency's settled regulatory actions and interpretations, it is unpersuasive and thus not entitled to *Skidmore* deference.

2. A review of recent EEOC charge statistics confirms that neither charging parties, nor the agency itself, understood the PDA to provide an affirmative right to pregnancy accommodations

The EEOC regularly publishes statistics outlining the number and types of discrimination charges that are filed each Fiscal Year (October 1 – September 30). Since at least Fiscal Year (FY) 2010, the agency has broken down its charge statistics by issue for each protected category under every law it enforces. Significantly, in Fiscal Years 2010, 2011, and 2012, the EEOC did not receive or record a single discrimination charge alleging failure to accommodate on the basis of sex. EEOC, Enforcement & Litigation Statistics, Bases by Issue FY 2010 – FY 2013.[10] It was not until Fiscal Year 2013 that the agency first observed any activity in this area, noting the receipt of 15 sex-based reasonable accommodation charges, out

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[10] *Available at* http://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm (last visited Oct. 29, 2014).

of 93,727 total charges received. *Id.* Those statistics fail to demonstrate that prospective charging parties, or EEOC intake personnel assisting them, understood Title VII to prohibit a failure to accommodate pregnancy.

To the contrary, they suggest that until very recently, the EEOC construed Title VII more narrowly to prohibit unequal and discriminatory treatment because of pregnancy – not to confer the right to preferential accommodations on that basis. Indeed, the intent of the EEOC's July 2014 guidance appears to be, at least in part, to bolster the agency's recent efforts to prioritize Title VII pregnancy accommodations issues and perhaps also to influence the outcome of this case.

B. The Timing And Context Of The July 2014 Guidance Confirms Its Lack Of The Power To Persuade

On December 17, 2012, a majority of the EEOC Commissioners approved the agency's Strategic Enforcement Plan (SEP) for Fiscal Years 2013 – 2016, which identifies six national enforcement priorities, including to address "emerging and developing" legal issues.[11] The EEOC describes that category as follows:

> **3. Addressing Emerging and Developing Issues.** As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Under this SEP, the EEOC will continue to prioritize issues that may be emerging or developing. Given the EEOC's

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[11] *Available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Oct. 29, 2014).

> research, data collection, and receipt of charges in the private and public sectors, and adjudication of complaints and oversight in the federal sector, the agency is well-situated to address these issues.
>
> Swift and responsive attention to demographic changes (*e.g.* the aging of the workforce), recently enacted legislation, developing judicial and administrative interpretations and theories, and significant events (*e.g.* the attacks of 9/11) that may impact employment practices can prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law.
>
> *For example, the Commission recognizes that elements of the following issues are emerging or developing*: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat ... ; 2) *accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)*; and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

U.S. EEOC Strategic Enforcement Plan for Fiscal Years 2013 – 2016 at III.B.3. (emphasis added).

By the EEOC's own admission, whether and to what extent employers have an obligation to affirmatively accommodate pregnancy and related conditions is an "emerging or developing" legal issue – and thus is far from settled. *Id.* Because the July 2014 guidance follows the Commission's decision to designate Title VII pregnancy accommodations as an "emerging" legal

issue, it appears to be more a *post hoc* rationalization designed to bolster the agency's new enforcement priorities than an informed interpretation of the statute based on longstanding agency policy and enforcement principles.

Also, the EEOC published its revised guidance on July 14, 2014, thirteen days after this Court granted certiorari in this case. The timing of the EEOC's actions alone suggest that the guidance is designed as much to influence this Court and other policymakers as to express the agency's "informed judgment" regarding the proper interpretation of Title VII.

The Commission itself was deeply divided regarding the propriety of publishing the July 2014 guidance, with only three of the five sitting Commissioners voting in favor of doing so. Pointing to the lack of legal support underlying the agency's expressed policy views – particularly regarding its interpretation of the obligation to provide pregnancy accommodations – the two dissenting Commissioners not only voted against issuing the new guidance, but also took the unusual step of publishing written statements that decry the agency's decision to, among other things, "jump ahead of the U.S. Supreme Court" on that question. Public Statement of Commissioner Constance A. Barker, U.S. EEOC at 2 (July 14, 2014).

The EEOC's motivations in publishing the July guidance are questionable, at best, and certainly do not satisfy the *Skidmore* test. Accordingly, the agency's new interpretation is not entitled to any measure of judicial deference and should be disregarded by this Court.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit below should be affirmed.

Respectfully submitted,

KAREN HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae* National Federation of Independent Business Small Business Legal Center

RAE T. VANN
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W.
Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amici Curiae* Equal Employment Advisory Council and Society for Human Resource Management

October 2014

AMICUS CURIAE BRIEF

No. 12-1226

In The Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF HEALTH CARE PROVIDERS, THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND OTHER ORGANIZATIONS CONCERNED WITH MATERNAL AND INFANT HEALTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JUDITH L. LICHTMAN
VICTORIA S. SHABO
SARAH LIPTON-LUBET
SARAH FLEISCH FINK
VASANTHI REDDY
STEPHANIE D. YOST
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 986-2600
jllichtman@nationalpartnership.org

KATHERINE M. KIMPEL*
MAYA SEQUEIRA
KATE MUETING
SANFORD HEISLER, LLP
1666 Connecticut Ave. NW
Suite 300
Washington, DC 20009
(202) 499-5202
kkimpel@sanfordheisler.com
Counsel of Record

Attorneys for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties,[1] in support of Petitioner's argument that the grant of summary judgment was inconsistent with the text and intent of the Pregnancy Discrimination Act. Specifically, the *amici* – organizations concerned with improving maternal and infant health – submit this brief to highlight how denying pregnant workers job modifications that are granted to others similar in their ability or inability to work can force an impossible choice: the choice between ignoring the advice of one's health care provider for a healthy pregnancy and being forced off the job.

Because several *amici* have joined this brief, more detailed descriptions of each appear in the Appendix. The *amici* are:

- American College of Nurse-Midwives
- American College of Osteopathic Obstetricians & Gynecologists
- American Medical Women's Association
- American Nurses Association
- American Public Health Association

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. The Parties have filed blanket letters of consent to the filing of *amicus* briefs.

- National Advocates for Pregnant Women
- National Association of Nurse Practitioners in Women's Health
- National Partnership for Women & Families
- National Physicians Alliance
- Physicians for Reproductive Health
- Planned Parenthood Federation of America
- Society for Maternal-Fetal Medicine

SUMMARY OF ARGUMENT

Seventy-five percent of women entering the workforce today will become pregnant at least once while employed. Many pregnant women can work throughout their pregnancies without modifications on the job. However, for some women, physical effects or complications of pregnancy create temporary physical limitations. These women, typically on the advice of their health care providers, may ask their employers for modest job or worksite modifications – the same types of accommodations employers afford non-pregnant employees whose conditions or physical limitations make them similar in their ability or inability to work.

When employers deny pregnant workers these simple accommodations and treat them differently

than other employees, women are forced to decide whether to disregard the advice of their maternity care providers and risk compromising their own health and the health of their pregnancies, or give up jobs and incomes integral to their family's financial security. No woman should be put in that position. What is more, being forced off the job due to denial of an accommodation can also impact a pregnant woman's health by inhibiting her ability to maintain the same level of prenatal care. Many of these burdens are borne disproportionately by low-wage workers and women of color.

Allowing employers to impose these burdens through unequal treatment of pregnant workers deviates from sound health, economic, and social policy.

ARGUMENT

I. Women play a vital role in the workforce before, during, and after pregnancy.

The vast majority of families today include a woman who works. According to data reported by the U.S. Census Bureau, in 2013 only 8% of U.S. families were made up of married couples with children under eighteen where the father acted as sole breadwinner.[2]

[2] U.S. CENSUS BUREAU, *America's Families and Living Arrangements*, Tables FG1 & FG10 (2013), https://www.census.gov/hhes/families/data/cps2013FG.html (unpublished calculation: number of married family groups with own children under

(Continued on following page)

Indeed, the most recent figures from the Bureau of Labor Statistics indicate that in the United States, more than forty-three million women work full time.[3] Significantly, 75% of women entering the workforce today will become pregnant at least once while they are employed.[4] Most women return to the workforce after giving birth.[5]

When Congress passed the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), in 1978, it did so recognizing the "devastating impact which the loss of a working mother's salary will have on the family

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eighteen years where only the husband was employed divided by the total number of family groups that include two or more people related by birth, marriage or adoption who live together).

[3] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: TABLE A-18: EMPLOYED AND UNEMPLOYED FULL- AND PART-TIME WORKERS BY AGE, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY (2014), http://www.bls.gov/web/empsit/cpseea18.htm/; *see also* U.S. DEP'T OF LABOR, FUTUREWORK: TRENDS AND CHALLENGES FOR WORK IN THE 21ST CENTURY 28 (1999) (citing women's participation in the labor force at 28% in 1940, 40% in 1966, 51% in 1979, and 60% in 1998).

[4] Michelle R. Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92(6) J. APPLIED PSYCHOL. 1499, 1500 (2007).

[5] From 2005-2007, nearly 64% of women who gave birth for the first time returned to work within a year. LYNDA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 14 (2011), *available at* https://www.census.gov/prod/2011pubs/p70-128.pdf.

unit."[6] Today, nearly two-thirds of all mothers are either the sole, primary, or co-breadwinners for their families.[7] With women's earnings playing an ever-increasing role in the financial health and stability of families, more women than ever work late into pregnancy. Sixty-five percent of first time mothers who worked during pregnancy worked into the last month before giving birth; among full-time workers, 87% worked into the last month.[8]

This Court has recognized that Congress enacted the Pregnancy Discrimination Act so that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child

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[6] 123 CONG. REC. 29,657 (daily ed. Sept. 16, 1977) (statement of Sen. Harrison Williams).

[7] SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, BREADWINNING MOTHERS, THEN AND NOW 7 (2014), *available at* http://cdn.americanprogress.org/wp-content/uploads/2014/06/Glynn-Breadwinners-report-FINAL.pdf.; *see also* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 3 (2014) (discussing how the gap between what men and women contributed to the family resources is closing rapidly and how more than 28% of working women out-earned their husbands in 2011); *see also* WHITE HOUSE COUNCIL OF ECON. ADVISORS, NINE FACTS ABOUT AMERICAN FAMILIES AND WORK 4 (2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/nine_facts_about_family_and_work_real_final.pdf (noting, "In 2013, the income of employed married women comprised 44 percent of their family's income, up from 37 percent of household income in 1970.").

[8] LAUGHLIN, *supra* note 5, at 5-7.

and having a job."[9] Despite the Pregnancy Discrimination Act and this Court's rulings interpreting it, some employers continue today to subject pregnant women to the impossible choice between (i) the jobs and income so vital to the well-being of their families, and (ii) following their health care providers' advice about what is best for their own health and the health of their pregnancies. Families' increased reliance on the incomes of working women today, as compared to when Congress enacted the Pregnancy Discrimination Act thirty-six years ago, makes the stakes for women and families that much higher and the need for proper interpretation of the law – treating pregnant women the same as other employees similar in their ability or inability to work – that much more urgent.

II. Denial of simple modifications can mean pregnant workers have to choose between staying on the job and following their health care providers' advice for a healthy pregnancy.

Contrary to dated stereotypes that historically pervaded both popular and medical discourse,[10]

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[9] *International Union v. Johnson Controls*, 499 U.S. 187, 204 (1991) (citing 42 U.S.C. § 2000e(k)).

[10] In a 1984 report by the American Medical Association's Council on Scientific Affairs, the medical community acknowledged that it had wrongly reinforced stereotypes that pregnant women were not capable of working throughout pregnancy despite the fact that the "advice given by generations of physicians regarding work during normal pregnancy has historically been

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pregnancy does not inherently impede a woman's ability to participate in the workforce – even late into pregnancy.[11] Many women work throughout their pregnancies without appreciable change in their work or negative health effects. Of course, every pregnancy is different, and some women may require minor job modifications to continue working while maintaining their health and that of their pregnancies.

With more women working during pregnancy than ever before, it is inevitable that the demands of some jobs and some pregnancies may necessitate job modifications similar to those given to other workers. The need for such modifications depends on the individual woman's pregnancy, her job duties and her health care provider's advice.[12] Often, a confluence of

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more the result of social and cultural beliefs about the nature of pregnancy (and of pregnant women)" rather than the result of "documented medical experience" or "scientific basis." Council on Sci. Affairs, Am. Med. Ass'n, *Effects of Pregnancy on Work Performance*, 251(15) J. AM. MED. ASS'N 1995, 1995 (1984). *See also* Laura Schlichtmann, Comment, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 350, nn.100-03 (1994).

[11] *See* AM. ACAD. OF PEDIATRICS & AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR PERINATAL CARE 156 (7th ed. 2012) ("A woman with an uncomplicated pregnancy usually can continue to work until the onset of labor.").

[12] *See* Theresa Nesbitt, *Chapter 19: Ergonomic Exposures*, *in* REPRODUCTIVE HAZARDS OF THE WORKPLACE 435 (Linda M. Frazier & Martin L. Hage eds., 1998) ("[H]ealth professionals should provide individualized advice based on the specific physical demands of the job and the woman's baseline fitness level, risk factors, and medical condition."); *see also* AM. ACAD.

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factors necessitating an accommodation will arise in low-wage jobs, which tend to involve higher levels of physical exertion, such as prolonged standing, long hours, and heavy lifting, and which provide less flexibility in terms of schedule and worksite conditions.[13] This is compounded by the fact that lower socioeconomic status can be associated with poorer reproductive health outcomes.[14]

Under the Pregnancy Discrimination Act, employers are obligated to provide these modifications to pregnant women if other workers who are similar in their ability or inability to work are provided such accommodations.

A. Some pregnant workers will need job modifications to manage their pregnancies and minimize the risk of complications.

Being pregnant involves physiologic and anatomic changes that impose increased demands on women's

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OF PEDIATRICS & AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 11, at 156-57 (explaining that "women with medical or obstetric complications of pregnancy may need to make adjustments based on the nature of their activities, occupations, and specific complications").

[13] A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 5 (2013), *available at* http://www.abetterbalance.org/web/images/stories/ItShouldntBeAHeavyLift.pdf.

[14] Nesbitt, *supra* note 12, at 433.

bodies. As a result, some pregnant women experience physical limitations that impede their activities, and some job duties or workstation designs can become temporarily problematic. Often, these limitations can be addressed with small but important accommodations.

The stories of real women help illustrate the health-related struggles women can face when modest modifications are denied.[15] One accommodation that some employers refuse is allowing pregnant women to drink water over the course of the day.[16] In one instance, a pregnant cashier in New York who was not allowed to drink water during her shift, in contravention of her doctor's recommendation to stay well-hydrated, was rushed to the emergency room after collapsing at work.[17] As the emergency room doctor who treated her explained, because "pregnant

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[15] Every woman's experience with pregnancy is different. The stories in this brief convey the experiences of individual women who have grappled with the denial of minor accommodations that would have allowed them to take the steps that they and their health care providers determined were needed to maintain a healthy pregnancy or minimize the risk of complications.

[16] *See, e.g.*, *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669 (D. Kan. June 9, 2009) (retail employee suffering from urinary and bladder infections denied permission to carry a water bottle despite her doctor's advice); *see also* A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., *supra* note 13, at 4.

[17] Letter from Lucy Willis, M.D., N.Y. Downtown Hosp., to James Vacca, N.Y. City Council Member (Dec. 4, 2012), http://www.abetterbalance.org/web/images/stories/Willis_letter_of_support.pdf.

women are already at increased risk of fainting (due to high progesterone levels causing blood vessel dilation), dehydration puts them at even further risk of collapse and injury from falling."[18] Another pregnant worker was prohibited from carrying a water bottle while stocking grocery shelves despite her doctor's instructions that she drink water throughout the day to prevent dehydration. She experienced preterm contractions, requiring multiple hospital visits and hydration with IV fluids.[19]

A simple accommodation that some employers also deny is permitting pregnant women to take more frequent bathroom breaks.[20] Hormonal changes and increased blood volume associated with pregnancy cause blood to flow more quickly through the kidneys, increasing urine output. With the expansion of the uterus, the decreased capacity of the bladder increases the frequency and urgency of urination.[21]

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[18] *Id.*; *see also* Mayo Clinic, *Dehydration Symptoms* (Feb. 12, 2014), http://www.mayoclinic.org/diseases-conditions/dehydration/basics/symptoms/con-20030056 (describing the symptoms of dehydration).

[19] *Hearing on H.B. 8 Before the H. Comm. on Labor & Commerce*, 98th Gen. Assem. (Ill. 2014) [hereinafter *Hearing*] (statement of Autumn Davidson, M.D.).

[20] A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., *supra* note 13, at 4.

[21] F.G. Cunningham et al., *Chapter 5: Maternal Physiology*, *in* WILLIAMS OBSTETRICS (F.G. Cunningham et al. eds., 23rd ed. 2010).

The inability to void one's bladder when needed can lead to episodes of incontinence.[22]

In addition, women suffering from urinary tract infections, which are among the most common infections during pregnancy and can be associated with other pregnancy complications, require more frequent access to a bathroom.[23] One woman, a pregnant retail worker in the Midwest who had developed a painful urinary tract infection, supplied a letter from her doctor to her employer explaining that she needed a short bathroom break more frequently than the store's standard policy. The store refused. She later suffered another urinary tract infection that required her to miss multiple days of work and receive medical treatment.[24]

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[22] *See id.* (noting many pregnant women experience some degree of urinary incontinence).

[23] John E. Delzell, Jr. & Michael L. LeFevre, *Urinary Tract Infections During Pregnancy*, 61(3) AM. FAM. PHYSICIAN 713 (2000), *available at* http://www.aafp.org/afp/2000/0201/p713.html#sec-8 (discussing urinary tract infections and pregnancy complications); Betsy Foxman, *Epidemiology of Urinary Tract Infections: Incidence, Morbidity, and Economic Costs*, 113(1) AM. J. MED. 5, 5-13 (2002) (noting that urinary tract infections "are the most common bacterial infections during pregnancy, and pyelonephritis is the most common severe bacterial infection complicating pregnancy"); Janice A. Litza & John R. Brill, *Urinary Tract Infections*, 37(3) PRIMARY CARE 491, 492 (2010) (discussing frequency of urination as a symptom of urinary tract infections).

[24] *Hearing*, *supra* note 19, at 1 (noting that "[p]regnant women need to use the restroom more frequently than non-pregnant

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Finally, some employers refuse to grant pregnant women modifications to physically demanding tasks, such as heavy lifting, prolonged standing, and bending or stooping, that may lead to musculoskeletal issues and other medical problems,[25] even though these modifications are afforded to other employees. Health care providers often recommend that a pregnant employee engaged in physically strenuous work be allowed time to sit or to decrease the amount of weight she is required to lift to lessen stress on her back. The need for a given modification depends on the interaction between a woman's physiological needs and the characteristics of her job duties.[26] For instance, pregnant women can be at risk for back pain and injury because of the weight of pregnancy, altered posture, and loosened joints caused by pregnancy hormones.[27] These physiological changes can result in an increase in pain and fatigue, which can be significant for some women.[28]

Although many women will not require job modifications during pregnancy, some will, and "[i]t

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women do, and prolonged urinary retention predisposes women to urinary tract infections").

[25] Nesbitt, *supra* note 12, at 440-46, 449-50. For a discussion of the association between physically strenuous work and adverse pregnancy outcomes, including preterm birth and low birth weight, see Section II.B, *infra*.

[26] *Id.* at 445.

[27] *Id.* at 449.

[28] *Id.* at 441-43, 450.

remains the province of the obstetric care giver to counsel women on their own personal risks and any potential activity restrictions."[29] This is true in other medical contexts as well, as some workers with cardiac conditions, back injuries, or other ailments require modifications on the advice or recommendation of their physicians. Pregnant women should not be forced to ignore the advice of their health care providers – which is exactly what happens when employers treat them differently than other workers by denying them modest modifications afforded to other employees.

B. Denial of job modifications can pose risks to infant health.

Physically demanding work, such as prolonged standing, heavy lifting and carrying, and shift work and irregular schedules, has been associated with an increased risk for preterm birth and low birth weight in some studies.[30]

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[29] *Id.* at 450.

[30] *See, e.g.*, Monique van Beukering et al., *Physically Demanding Work and Preterm Delivery: A Systematic Review and Meta-Analysis*, INT'L ARCHIVES OF OCCUPATIONAL & ENVTL. HEALTH (2014) (discussing association of prolonged standing, lifting and carrying, physical exertion, and a combination of those tasks with preterm birth); Ellen L. Mozurkewich et al., *Working Conditions and Adverse Pregnancy Outcome: A Meta-Analysis*, 95 OBSTETRICS & GYNECOLOGY 623, 630-31 (2000) (discussing the association of physically demanding work and prolonged standing with preterm birth, and physically demanding work

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Preterm delivery and low birth weight are among the leading causes of infant morbidity and mortality.[31] These conditions can have serious consequences, including compromised immune systems, lung complications, and cardiovascular and neurological issues, and can lead to long-term health problems and

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with small-for-gestational-age infants); Agathe Croteau et al., *Work Activity in Pregnancy, Preventive Measures, and the Risk of Delivering a Small-for-Gestational-Age Infant*, 96(5) AM. J. PUB. HEALTH 846, 850-52 (2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470590/pdf/0960846.pdf (discussing the association of irregular or shift work, standing posture, lifting, and combination thereof with low birth weight, and noting that "[t]he elimination of these occupational conditions by preventive measures taken early, before 24 weeks' gestation, brought workers' risk close to those of women who were not exposed to those conditions at the beginning of pregnancy"); Stine Bjerrum Runge et al., *Occupational Lifting of Heavy Loads and Preterm Birth: A Study Within the Danish National Birth Cohort*, 70 OCCUPATIONAL & ENVTL. MED. 782, 782 (2013) (noting that occupational lifting of heavy loads is associated with an increased risk of preterm birth, with the strongest associations for very and extremely preterm birth); RENEE BISCHOFF & WENDY CHAVKIN, THE RELATIONSHIP BETWEEN WORK-FAMILY BENEFITS AND MATERNAL, INFANT, AND REPRODUCTIVE HEALTH: PUBLIC HEALTH IMPLICATIONS AND POLICY RECOMMENDATIONS 13-16 (2008), *available at* http://otrans.3cdn.net/70bf6326c56320156a_6j5m6fupz.pdf (discussing the association between physically demanding work and preterm birth and low birth weight).

[31] Ctrs. for Disease Control & Prevention, *Infant Mortality* (Aug. 12, 2014), http://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm; MATERNAL & CHILD HEALTH BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD HEALTH USA 2013 (2013), *available at* http://mchb.hrsa.gov/chusa13/perinatal-health-status-indicators/pdf/imorbidity.pdf.

lifelong disabilities including cerebral palsy, vision problems, and intellectual disabilities.[32]

The tolls of preterm delivery are illustrated by the story of one pregnant cashier who was forced to disregard her doctor's advice on how to reduce the risk of pregnancy complications when she was refused the simple modification of being allowed to sit on a stool instead of stand at her register. Because she had a shortened cervix which put her at higher risk for a premature delivery, her doctor instructed her to avoid prolonged periods of standing.[33] Despite presenting her employer with a letter from her doctor requesting that she be allowed to sit at the register for short intervals, the accommodation was denied. Instead, she was required to stand for extended periods, suffered from severe pelvic pressure, and went

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[32] COMM. ON UNDERSTANDING PREMATURE BIRTH & ASSURING HEALTHY OUTCOMES, INST. OF MED., PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION 313 (Richard E. Behrman & Adrienne Stith Butler eds., 2007); Ctrs. for Disease Control & Prevention, *Preterm Birth* (Dec. 9, 2013), http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm.

[33] *Hearing*, *supra* note 19, at 2; *cf.* Soc'y of Obstetricians & Gynaecologists of Can., *Cervical Insufficiency and Cervical Cerclage*, 35(12) J. OBSTETRICS & GYNAECOLOGY CAN. 1115, 1121 (2013), *available at* http://sogc.org/wp-content/uploads/2013/11/December2013-CPG301-ENG-REV-Dec-13-13.pdf (noting that conservative observational management of cervical insufficiency can include "advising the patient to reduce physical activity, especially those with physical employment, prolonged periods of standing, or frequent and repetitive lifting").

into labor early. Her baby required seven days of critical care in the neonatal intensive care unit.[34]

In addition to the human costs, preterm birth and its attendant complications have high financial costs. The Institute of Medicine (IOM) has reported that the cost associated with premature birth in the United States is over $26 billion each year.[35] This total includes $16.9 billion in medical and health care expenditures for children born prematurely and an additional $1.9 billion in labor and delivery costs for women.[36] During the first year, a premature infant's average medical care costs, including both inpatient and outpatient services, are ten times greater than those for an infant born full-term.[37] The IOM's estimate also includes the cost of special education services related to certain disabilities that are more

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[34] *Hearing*, *supra* note 19, at 2. The story of a cashier at a Dollar Tree store in New York is strikingly similar. Her employer rejected her modest request to sit while at the register instead of having to stand for eight to ten hours at a time. She experienced bleeding and premature labor pains, and required frequent emergency room visits. Her doctor then put her on bed rest, which required her to take unpaid leave. *See* A BETTER BALANCE & NAT'L WOMEN'S LAW CTR., *supra* note 13, at 13.

[35] COMM. ON UNDERSTANDING PREMATURE BIRTH & ASSURING HEALTHY OUTCOMES, *supra* note 32, at 399.

[36] *Id.*

[37] MARCH OF DIMES, P'SHIP FOR MATERNAL, NEWBORN & CHILD HEALTH, SAVE THE CHILDREN & WORLD HEALTH ORG., BORN TOO SOON: THE GLOBAL ACTION REPORT ON PRETERM BIRTH 12 (2012), *available at* http://www.marchofdimes.com/materials/born-too-soon-the-global-action-report-on-preterm-birth.pdf.

common following premature births, as well as lost household and market productivity associated with those conditions.[38] The estimate does not, however, include the cost of caregiving, which can exceed medical costs.[39]

Given the serious and long-lasting implications of preterm birth and low birth weight for infants and families, the denial of modest job modifications where a woman's health and job duties may pose an increased risk to her pregnancy is a significant concern.

C. Job loss can also undermine a healthy pregnancy.

Denial of job modifications means that pregnant workers are either required to labor under conditions their health care providers have advised against, or find themselves out of work at an especially vulnerable time. When women in this situation are forced off the job, the loss of income and benefits such as employer-sponsored health insurance can make it difficult for them to obtain the same level of prenatal care and can create uncertainty about options for care around the time of birth and in the postpartum period.

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[38] COMM. ON UNDERSTANDING PREMATURE BIRTH & ASSURING HEALTHY OUTCOMES, *supra* note 32, at 399.

[39] *Id.* at 401.

Having to change health coverage during pregnancy can disrupt women's continuity of care and ability to access essential services. Women may lose access to their maternity care providers or hospitals because their providers or preferred facilities are now out-of-network. Worse, women may face elevated or prohibitive cost-sharing requirements if they are unable to afford individual policies that match the value of their former employer's health plan. Particularly when a pregnant woman's lost income creates significant financial burdens for her family, higher cost-sharing for covered services in the form of co-pays, co-insurance, and deductibles could make medical care cost-prohibitive at exactly the time when it is needed the most. For some women, if private individual policies remain financially out of reach and public programs like Medicaid are unavailable, loss of employer-sponsored insurance during a pregnancy could mean falling out of coverage entirely and shouldering the burden of prenatal and maternity care out-of-pocket.[40]

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[40] In 2009, the average cost of prenatal care and delivery without complications was nearly $10,000 – an amount that most working families in America cannot afford to absorb. The costs for a complicated pregnancy can be much higher. *See* STEVEN MACHLIN & FREDERICK ROHDE, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH CARE EXPENDITURES FOR UNCOMPLICATED PREGNANCIES, 2009 (2012), *available at* http://meps.ahrq.gov/mepsweb/data_files/publications/rf32/rf32.pdf.

Consistent prenatal care is one of the most critical contributors to a healthy pregnancy.[41] When women go without prenatal care, they are three to four times more likely to suffer fatal pregnancy-related complications.[42] Similarly, infants whose mothers did not receive prenatal care are three times more likely to be low birth weight and five times more likely to die than those whose mothers were able to obtain care.[43]

III. Denial of simple modifications may disproportionately affect women of color, who already suffer existing health disparities.

Denial of requested workplace modifications in violation of the Pregnancy Discrimination Act may disproportionately impact women of color, their families and their health. Women of color are often over-represented in low-wage jobs that are physically

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[41] Nat'l Inst. of Child Health & Human Dev., Nat'l Insts. of Health, U.S. Dep't of Health & Human Servs., *What Is Prenatal Care and Why Is It Important?* (July 12, 2013), http://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/Pages/prenatal-care.aspx.

[42] Debra Bingham, Nan Strauss & Francine Coeytaux, Ass'n of Reprod. Health Profs., *Maternal Mortality in the United States: A Human Rights Failure*, 83 CONTRACEPTION 189, 190 (2011), *available at* https://www.arhp.org/publications-and-resources/contraception-journal/march-2011.

[43] Office on Women's Health, U.S. Dep't of Health & Human Servs., *Prenatal Care Fact Sheet* (July 16, 2013), http://www.womenshealth.gov/publications/our-publications/fact-sheet/prenatal-care.html#h.

demanding and do not offer workers the autonomy to sit rather than stand, avoid lifting heavy loads, carry a water bottle or take more frequent bathroom breaks.[44] Indeed, as compared to white women, black and Hispanic women are more than two times as likely to work in service occupations, and less than a fifth of Hispanic women work in "professional and related" occupations.[45]

These workplace challenges can exacerbate existing health disparities faced by pregnant women of color. For example, women of color disproportionately suffer from complications related to pregnancy, including gestational diabetes and hypertensive disorders.[46] They also face barriers to accessing high quality prenatal care, which is central to maintaining a healthy pregnancy. In 2010, the U.S. government set a goal that 90% of women would receive "adequate prenatal care." However, nearly one-third (32%) of African American women and 41% of American

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[44] NAT'L LATINA INST. FOR REPROD. HEALTH & NAT'L WOMEN'S LAW CTR., ACCOMMODATING PREGNANCY ON THE JOB: THE STAKES FOR WOMEN OF COLOR AND IMMIGRANT WOMEN (2014), *available at* http://www.nwlc.org/sites/default/files/pdfs/the_stakes_for_woc_final.pdf (unpublished calculations).

[45] ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, THE GENDER WAGE GAP BY OCCUPATION (2012), *available at* http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-1#sthash.98Tkoven.dpuf.

[46] Andreea A. Creanga et al., *Racial and Ethnic Disparities in Severe Maternal Morbidity: A Multistate Analysis*, 2008-2010, 210 AM. J. OBSTETRICS & GYNECOLOGY 435.e1, 435.e2 (2014).

Indian and Alaskan Native women fell short of this goal, compared with only one-quarter (25%) of pregnant women overall.[47]

The morbidity and mortality rates for black infants similarly reflect these disparities. Within their first year, black infants are more than two times as likely to die as white infants.[48] This difference has not significantly changed in more than fifty years.[49] Much of the disparity is due to the increased rates of preterm birth and low birth weight among black newborns.[50] Nearly one in five infants born to black women are preterm, which is 60% higher than the rate of preterm birth for white women.[51]

In short, women of color both (i) face existing health disparities and barriers to care and (ii) are overrepresented in jobs that are physically strenuous and inflexible. As such, denials of workplace

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[47] Bingham, Strauss & Coeytaux, *supra* note 42, at 190 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTHY PEOPLE 2010: MIDCOURSE REVIEW (2000)).

[48] Michael C. Lu et al., *Closing the Black-White Gap in Birth Outcomes: A Life Course Approach*, 20 ETHNICITY & DISEASE S2-62 (2010).

[49] *Id.*

[50] *Id.* at S2-62.

[51] MARIAN F. MACDORMAN & T.J. MATHEWS, NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, NCHS DATA BRIEF NO. 74: UNDERSTANDING RACIAL AND ETHNIC DISPARITIES IN U.S. INFANT MORTALITY RATES 3 (2011).

modifications can have particularly stark impacts on women of color and their families.

CONCLUSION

Denying pregnant workers the same modest modifications afforded to other employees with similar work restrictions not only violates the Pregnancy Discrimination Act, it contravenes sound health, economic, and social policy. When an employer forces a pregnant woman to choose between her health care provider's advice and her job, that choice can risk compromising her health and the health of her pregnancy. We all have a stake in ensuring that women can pursue healthy pregnancies and minimize the risk of adverse outcomes. Where a woman and her provider have determined that a modification is needed to maintain a healthy pregnancy or to reduce harm, that accommodation may very well improve maternal health and decrease the risk of bad pregnancy outcomes.

Were this Court to rule for Ms. Young, employers across the country could no longer conduct business as though they are exempt from their obligations under the Pregnancy Discrimination Act. A ruling for Ms. Young would clarify the law, settling that the Pregnancy Discrimination Act requires employers to treat pregnant women the same as they treat other workers, including by providing pregnant women with temporary physical limitations the same

accommodations that they provide to other workers who are similar in their ability or inability to work.

For the above reasons, the *amici* respectfully suggest that the judgment of the Fourth Circuit should be REVERSED.

Respectfully submitted,

JUDITH L. LICHTMAN
VICTORIA S. SHABO
SARAH LIPTON-LUBET
SARAH FLEISCH FINK
VASANTHI REDDY
STEPHANIE D. YOST
NATIONAL PARTNERSHIP
FOR WOMEN & FAMILIES
1875 Connecticut Ave. NW
Suite 650
Washington, DC 20009
(202) 986-2600
jllichtman@
nationalpartnership.org

KATHERINE M. KIMPEL*
MAYA SEQUEIRA
KATE MUETING
SANFORD HEISLER, LLP
1666 Connecticut Ave. NW
Suite 300
Washington, DC 20009
(202) 499-[illegible]202
kkimpel@sanfordheisler.com
**Counsel of Record*

Attorneys for Amici Curiae

APPENDIX

APPENDIX

Descriptions of the *Amici Curiae*

The American College of Nurse-Midwives (ACNM) is the professional association that represents certified nurse-midwives (CNMs) and certified midwives (CMs) in the United States. With roots dating to 1929, ACNM sets the standard for excellence in midwifery education and practice in the United States and strengthens the capacity of midwives in developing countries. ACNM's members are primary care providers for women throughout the lifespan, with a special emphasis on pregnancy, childbirth, and gynecologic and reproductive health. ACNM reviews research, administers and promotes continuing education programs, and works with organizations, state and federal agencies, and members of Congress to advance the well-being of women and infants through the practice of midwifery.

Founded in 1934, the American College of Osteopathic Obstetricians & Gynecologists (ACOOG) is a nonprofit, nonpartisan organization committed to excellence in women's health. The ACOOG strives to educate and support osteopathic physicians to improve the quality of life for women by promoting programs that are innovative, visionary, inclusive, and socially relevant.

Founded in 1915, the American Medical Women's Association (AMWA) is the oldest, national multispecialty organization for women in medicine. AMWA has consistently championed issues pertaining to

women's health, leadership, and gender equity. AMWA's mission focuses on all areas of women's health, including treatment and prevention of disease, reproductive health, education, and socioeconomic determinants of health; AMWA advocates for equal rights for women, both in the workplace and in society. As the vision and voice of women in medicine for nearly a century, AMWA empowers women to lead in improving health for all within a model that reflects the unique perspective of women.

The American Nurses Association (ANA) represents the interests of the nation's 3.1 million registered nurses. Founded over a century ago and with members in every state across the nation, ANA is comprised of state nurses associations and individual nurses. Collectively, ANA and its organizational affiliates represent more than 300,000 nurses who practice across the continuum of care and in all health care settings. ANA is an advocate for quality health care and the protection of rights that support appropriate care.

The American Public Health Association (APHA) champions the health of all people and all communities and strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public health issues and policies grounded in research. APHA is the only organization that combines a 140-plus year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health. APHA is committed to supporting

healthy and safe work environments and improving maternal and infant health outcomes to advance the health and well-being of individuals and the broader public health.

National Advocates for Pregnant Women (NAPW) works to secure the human and civil rights, health and welfare of all women, focusing particularly on pregnant and parenting women, and those who are most vulnerable, such as low income women and women of color. NAPW seeks to ensure that women do not lose their constitutional, civil, and human rights as a result of pregnancy, and that pregnant and parenting women have access to a full range of reproductive health service without penalty for seeking the care they need. By focusing on the rights of pregnant women, NAPW broadens and strengthens the reproductive justice and other interconnected social justice movements in America today.

The National Association of Nurse Practitioners in Women's Health (NPWH) is a nonprofit, nonpartisan professional membership organization dedicated to ensuring women's access to quality primary and specialty healthcare by women's health and women's health focused nurse practitioners. NPWH's constituents are at the front line of providing pregnancy related health care to women, and recognize the importance of fair employment policies that support women's continued contributions to the workforce and a healthy pregnancy outcome. Since its inception in 1980, as the National Association for Nurse Practitioners in Reproductive Health, NPWH has worked to

improve women's wellness and health outcomes – including pregnancy outcomes – and to promote policies that decrease health disparities and inequities that adversely impact the health of women and their families. NPWH continues to be committed to improving women's health care delivery and health outcomes through research and education efforts.

The National Partnership for Women & Families is a nonprofit, nonpartisan national advocacy organization dedicated to promoting fairness in the workplace, access to quality health care, and policies that help workers in the United States meet the dual demands of work and family. Since its founding as the Women's Legal Defense Fund in 1971, the National Partnership has worked to advance equal employment opportunities through several means, including by taking a leading role in the passage of the Pregnancy Discrimination Act of 1978 and by challenging discriminatory employment practices in the courts. The National Partnership is likewise committed to improving the quality of maternity care and maternal health outcomes through research and advocacy.

The National Physicians Alliance (NPA) creates research and education programs that promote health and foster active engagement of physicians with their communities to achieve high quality, affordable health care for all. The NPA offers a professional home to physicians across medical specialties who share a commitment to professional integrity and health justice.

Physicians for Reproductive Health (PRH) is a doctor-led, national, not-for-profit organization that relies upon evidence-based medicine to advance its mission of improving access to comprehensive reproductive health care, including contraception and abortion, especially to meet the health care needs of economically disadvantaged patients. PRH believes that women should be able to follow the advice of their doctors regarding their health, including in the course of their employment, without fear of negative consequences or retaliation.

Planned Parenthood Federation of America is the leading provider of reproductive health care in the United States, delivering medical services through over 700 health centers operated by 67 affiliates across the United States. Planned Parenthood Federation of America's mission is to provide comprehensive reproductive health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services. One out of every five women in the United States has received care from Planned Parenthood.

The Society for Maternal-Fetal Medicine (SMFM) was established in 1977 to give Maternal-Fetal Medicine physicians and scientists a place to share knowledge, research, and clinical best practices in order to improve care for moms and babies. SMFM's vision is to lead the global advancement of women's and children's health through pregnancy care, research, advocacy, and education. SMFM and its

members dedicate themselves to improving maternal and child outcomes and raising the standards of prevention, diagnosis, and treatment of maternal and fetal disease. SMFM is committed to improving the quality of maternity care and maternal and infant health outcomes through research, education/training, advocacy, and health policy leadership.

AMICUS CURIAE BRIEF

No. 12-1226

In The Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LAW PROFESSORS AND WOMEN'S AND CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JELENA KOLIC
Staff Attorney
LEGAL MOMENTUM
5 Hanover Square
Ste. 1502
New York, NY 10004
(212) 413-7522

JOANNA L. GROSSMAN
Counsel of Record
Sidney & Walter Siben
Distinguished Professor
of Family Law
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, NY 11549
(516) 463-5241
lawjlg@hofstra.edu

DEBORAH L. BRAKE
Professor of Law and
Distinguished Faculty Scholar
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 648-2655

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors, women's rights organizations, and civil rights organizations that share expertise in pregnancy discrimination and a longstanding commitment to civil rights and equality in the workplace for all Americans. Their interest in this case is in ensuring that the Pregnancy Discrimination Act is given its intended meaning. Statements of interest for the organizations and a list of individual signatories may be found in Appendix A.

SUMMARY OF ARGUMENT

This case presents an issue of great significance for working women in the United States. The Fourth Circuit's ruling interprets the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k) (2012) ("PDA"), in a manner that is inconsistent with the statutory text, Congress' intent, and this Court's post-PDA precedents. The ruling reverts to a pre-PDA approach, placing pregnancy in a class by itself and excluding pregnant women from workplace benefits and accommodations available to others who are similar

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent have consented to its filing in letters on file with the Court.

in their ability or inability to work. The ruling undermines the very purpose of the PDA, which was to help pregnant women maintain labor-force attachments and have greater economic stability.

The Fourth Circuit's ruling reinvigorates the reasoning in *General Electric v. Gilbert*, 429 U.S. 125 (1976), which the PDA was specifically passed to supersede. It marks a return to the philosophy that employers can provide less support for pregnancy than they do for other health conditions that affect work, so long as their decision to deny coverage is not motivated by animus. But the PDA repudiates this approach. In its Second Clause, the Act defines what equal treatment means: employers must treat pregnant workers "the same as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). In other words, the PDA creates a comparative right of accommodation with a baseline that turns on the work effects of an employee's incapacity, rather than its source. This mandate solves the analogy problem that plagued pre-PDA courts and led employers to simply exempt pregnancy, a health condition that affects only women, from otherwise available benefits. This Court has consistently instructed that the Second Clause means what it says – that pregnant workers cannot be treated worse than workers with similar limitations.

By refusing to allow Peggy Young to compare herself to workers injured on the job, workers whose accommodations were required by a collective bargaining agreement, or workers entitled to accommodations

under the Americans with Disabilities Act, 42 U.S.C. §12101 ("ADA"), the Fourth Circuit has stripped pregnant women of most potential comparators. This renders the comparative right of accommodation around which the PDA is built essentially meaningless. This problem will only escalate with the recent amendments to the ADA, 42 U.S.C. §12102, which expand the pool of employees entitled to reasonable accommodation to include those with temporary conditions analogous to pregnancy. Under this reading, Congress' expansion of protections for employees with other disabilities would have the perverse effect of decreasing the level of support for pregnancy. The Fourth Circuit's approach, if left standing, will exponentially widen the gulf in employment opportunities between pregnant women and others "similar in their ability or inability to work." *See* 42 U.S.C. §2000e(k). Nothing in the text of the ADA or its amendments supports this reading, nor is there any precedent for allowing one statute to nullify another without express Congressional direction to do so.

The Fourth Circuit's central mistake is to collapse the PDA's first and second clauses into a singular search for animus. Instead of simply asking whether Peggy Young was treated worse than other employees similar in their ability or inability to work, as clearly mandated by the statutory text, the Fourth Circuit mistakenly applied the pretext model of proof in a search for an invidious motive. But a formal policy that ignores the PDA's directive to treat two groups the same is unlawful disparate treatment, regardless

of the motive underlying the policy. This approach ignores the PDA's clear command to focus on the effects of pregnancy rather than its unique nature in order to ensure equal opportunity for women and mothers. The Fourth Circuit's ruling exacerbates harmful stereotypes about pregnant workers, one of the primary problems the PDA was intended to counteract. The lower court's reasoning and approach traffic in the notion that pregnancy is a unique liability undeserving of accommodation and reinforce a gender ideology that is incompatible with women's full participation in the labor force.

Moreover, the women most in need of the PDA's protection are most harmed by the ruling below. The persistence of pregnancy discrimination in the workplace is well documented, but it is women in low-wage jobs or traditionally male-dominated occupations who are most likely to experience temporary conflicts between the physical effects of pregnancy and job requirements. Studies and caselaw reveal a reluctance by some employers to provide even minor and costless accommodations, reflecting hostility to pregnant women in the workplace. Pregnancy discrimination excludes women from traditionally 'male' jobs and renders low-wage, sex-segregated jobs less secure. The Fourth Circuit's misunderstanding of the PDA's Second Clause will create profound economic instability for such women and their families, leading to well-known obstacles to re-entry if they lose their jobs.

In sum, the Fourth Circuit's ruling adopts a view of pregnancy discrimination that belies both the text

and intent of the PDA, reinforces stereotypes about the incompatibility of pregnancy with paid employment, and undermines this Court's longstanding commitment to the "equal opportunity to aspire, achieve, participate in and contribute to society based on individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996).

For these reasons, we urge the Court to reverse the Fourth Circuit's ruling and restore the intended scope of the PDA.

ARGUMENT

I. The Decision Below Ignores the History of the PDA and Revives the Very Decisions Congress Sought to Supersede.

The Fourth Circuit's ruling belies the history that led to the PDA's enactment. In *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974), this Court refused to recognize that the exclusion of pregnancy, a condition only affecting women, from an otherwise near-comprehensive disability plan discriminates on the basis of sex. Although criticism of *Geduldig* would soon become a "cottage industry," Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 983 (1984), and the opinion would later become one with a "widely criticized conclusion" that members of this Court are "perhaps embarrassed" to cite, *Coleman v. Ct. of Appeals*, 132 S. Ct. 1327, 1347 n.6 (2012) (Ginsburg, J., dissenting), its circle of

damage was nonetheless expanded two years later. In *General Electric v. Gilbert*, 429 U.S. 125, 128 (1976), this Court applied the same formalistic reasoning to hold that pregnancy discrimination was not a form of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* (2012). The Court thus upheld a private employer's policy that denied disability benefits during pregnancy leave while granting them for other types of temporary leave. Briefs in *Geduldig* had urged this Court to consider the potential impact on Title VII, *see* Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 Wash. U.L. Rev. 453, 485, 491-92 (2014), for fear of this exact result.

Congress enacted the PDA for the express purpose of repudiating this Court's holding in *Gilbert* and the *Geduldig* reasoning that drove it. Congress did not hide its disdain for *Gilbert* and its intent to override it. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 277 (1987) (observing that the PDA unambiguously rejected *Gilbert*); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (same). The PDA contains two distinct clauses. The First Clause rejects *Gilbert* by adding a new provision to the definitions section of Title VII, providing that the "terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000e(k). Notably, the two quoted phrases in the statute appear, in this precise

form, nowhere else in the statute. They do appear, however, in the *Gilbert* decision. *Gilbert*, 429 U.S. at 135, 145 (holding that the exclusion of pregnancy does not discriminate "on the basis of sex" and is compatible with Congress' command to prohibit discrimination "'because of sex'"). This particular drafting of the statute makes sense only as a direct response to *Gilbert*. The Second Clause directs how employers must treat pregnant workers: "the same as other persons not so affected but similar in their ability or inability to work. ." 42 U.S.C. §2000e(k).

In enacting the PDA, Congress recognized that employer responses to pregnancy have played a central role in workplace discrimination against women. As Justice Ginsburg has observed, "[c]ertain attitudes about pregnancy and childbirth, throughout human history, have sustained pervasive, often law-sanctioned, restrictions on a woman's place among paid workers and active citizens." *AT&T Corp. v. Hulteen*, 556 U.S. 701, 724 (2009) (Ginsburg, J., dissenting); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (striking down school board rule forcing pregnant teachers to take unpaid leave after the fourth month of pregnancy); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Georgetown L.J. 567, 595-600 (2010) (discussing exclusionary policies and practices). Congress responded to this history with specific directives to eliminate a wide-range of employment policies that openly discriminated against pregnant

workers or based employment decisions on stereotyped assumptions about their capacity to work. The PDA was designed to make the workplace as amenable to pregnancy as it was to other conditions affecting work – something employers had been reluctant to do on their own, even when unions pushed for such treatment in the collective bargaining process. *See* Dinner, *Strange Bedfellows*, *supra*, at 472-74.

The PDA was a swift rejection of the Court's earlier philosophy on pregnancy: that ignoring the status of pregnancy fully met an employer's obligation to pregnant workers. Instead, the Act was designed to "enable women to maintain labor-force attachments throughout pregnancy and childbirth." Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 484 (2011). Thus, the decision below, which equates pregnancy-blindness with PDA compliance ignores – even defies – that history. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 Notre Dame L. Rev. 511, 551-56 (2009). By characterizing UPS's light-duty policy as "pregnancy-blind," the Fourth Circuit is engaging in the same kind of formalistic reasoning as the Court did in *Geduldig* and *Gilbert*. *See* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1358-59 (2012) (noting that "*Gilbert* relied on the same narrow, anticlassificationist reasoning [seeing discrimination as applicable] only to practices that

sort men and women into two groups perfectly differentiated on the basis of biological sex."). The policies in *Gilbert* and *Geduldig* could easily have been deemed "pregnancy blind" under the Fourth Circuit's standard if reworded only slightly to specify a near-exhaustive list of covered conditions while omitting pregnancy. Allowing this ruling to stand would breathe life into precedent specifically overridden by Congress.

II. The Decision Below Misconstrues and Misapplies the Second Clause of the PDA.

A. The Second Clause of the PDA Creates and Defines a Right to Equal Treatment.

The decision below fails to give any effect to the Second Clause of the PDA, which provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). To remedy a long-standing problem of employer policies that treated pregnancy as *sui generis* and denied pregnant women otherwise generally available benefits, Congress created a comparison group for pregnant women – employees "similar in their ability or inability to work" – and directed that the two groups be treated "the same for all employment-related purposes." *Id.*; *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983) ("The meaning of the first clause is not limited by the specific language in the second clause, which explains the

application of the general principle to women employees.").

The Second Clause, by design, solves the analogy problem – the idea that pregnancy could be treated worse simply because it was not identical to any other work-limiting condition – that lay behind *Geduldig* and *Gilbert*. It establishes a baseline – a "floor . not a ceiling," *Guerra*, 479 U.S. at 285 – that entitles pregnant workers to identify instances of unequal treatment and demand parity. Moreover, as this Court made clear in *Guerra*, under the PDA, a comparator may be selected *only* on the basis of ability or inability to work: the employer's motivation for accommodating the needs of the comparator is irrelevant. This remains true when the employer is compelled to treat a comparator in a certain manner in order to comply with some other law. *See Section III infra.* As the House Report on the PDA explains, the Second Clause provides the *only* appropriate point of comparison for pregnant workers with comparable limitations: "their actual ability to perform work." H.R. Rep. 95-948, at 5 (1978); *see also* Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4 (1977) ("Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees.").

This interpretation does not convert the comparative right of accommodation into an absolute one,

requiring "special treatment" for pregnant workers who require accommodation. Quite the contrary. Accommodating workers with comparable limitations but not pregnant workers *disadvantages* pregnant women. As the new guidance issued by the Equal Employment Opportunity Commission ("EEOC") makes clear, employers can limit the number or duration of light-duty assignments, or even refuse to offer them altogether, as long as limits or restrictions apply to pregnant and non-pregnant workers with similar levels of incapacity alike. *See* U.S. Equal Employment Opportunity Comm'n, *EEOC Enforcement Guidance on Pregnancy and Related Issues*, No. 915.001, July 14, 2014, at 11 (hereinafter "EEOC Guidance"). But what they cannot do is offer benefits to some similarly restricted workers while withholding them from pregnant workers.

Peggy Young's complaint simply asks that the Second Clause of the PDA be given the effect its text mandates. The Second Clause denotes an additional and distinctive obligation with independent meaning. The statute's structure makes this apparent. The Second Clause is set off by a semi-colon and the word "and," and it includes a verb – "shall" – that clearly imposes a discrete obligation on employers: employers "shall" treat pregnant workers the "same" as other workers with similar work limitations.[2]

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[2] That the PDA appears in the definitional section of Title VII is of no matter. The mandate for religious accommodations appears there as well, but has been given full substantive effect.

(Continued on following page)

Moreover, the Second Clause does not invite employers to treat pregnancy only as well as other least favored workers. Even the policies at issue in *Geduldig* and *Gilbert*, which Congress clearly rejected under Title VII, excluded some other conditions – dispsomania and sexual psychopathy, for example – along with pregnancy.

The PDA directive is simple. If an employer provides support for other health conditions that interfere with work, it must provide the same level of support for pregnancy. Indeed, the Fourth Circuit conceded that "[s]tanding alone, the second clause's plain language is unambiguous." The lower court nevertheless declined to apply its clear import by alleging that its juxtaposition with the first clause creates "confusion" and "potential incongruence." Pet App. 20a-21a. It then resolved its straw-man conflict by taking the draconian step of rendering the Second Clause meaningless, in direct contravention of this Court's warning not to "read the second clause out of the Act," *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). The ruling below asserts that the Second Clause "does not create a

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See 42 U.S.C. §2000e(j) (2012); *Abramson v. William Paterson Coll.*, 260 F.3d 265, 281 & n.12 (3d Cir. 2001). Moreover, the text of the Second Clause cannot be "'substituted' in for sex" in the anti-discrimination provisions of Title VII without resulting in "grammatically incoherent directives." Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 1012-13 (2013).

distinct and independent cause of action," not because the text does not support that reading, but because such a reading would create "anomalous consequences" such as treating pregnancy "more favorably than any other basis" under Title VII. Pet. App. 20a-21a. But this is clearly incorrect. Providing an accommodation to a pregnant employee when an employer has made the *same* accommodation available to employees with other health conditions is not "more favorable" treatment – it is simply equal treatment, as mandated by the PDA. As this Court explained in *Johnson Controls*, 499 U.S. at 204, "The PDA's amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" (quoting 42 U.S.C. §2000e(k)). Eschewing this Court's holding that "the PDA means what it says," *id.* at 211, the court below departed from the text and its intended meaning to circumscribe protection for pregnant workers.

B. The Fourth Circuit's Approach Turns the Second Clause Into a Search for Animus and Misapprehends the Theory Behind the PDA.

The court below neglected the teachings of this Court's PDA decisions and misunderstood both the theory behind PDA and the approach to pregnancy discrimination it embraces. This Court has long been clear that treating pregnancy differently than other conditions with a similar effect on work violates the

statute regardless of the employer's motivation. *See Johnson Controls,* 499 U.S. at 199 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Newport News*, 462 U.S. at 684 ("The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."). Instead of simply applying the Second Clause, the court below embarked on an unnecessary and ill-conceived search for anti-pregnancy animus. Pet. App. 17a-18a (faulting plaintiff's lack of "evidence of UPS's discriminatory animus toward pregnant workers"); Pet. App. 28a (stating that the "facts fail to demonstrate the specific animus Young ascribes to them"); Pet. App. 17a-19a (rejecting plaintiff's evidence for failing to show "general corporate animus against pregnant employees"). Finding none, the court pronounced the UPS policy "pregnancy-blind." Pet. App. 18a. The Fourth Circuit is not alone on this misguided path. *See Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 640-41 (7th Cir. 2006). This Court must remind lower courts that no additional proof of intent is required if a plaintiff proves that her employer treated pregnancy worse than other conditions with a similar effect on work.

The Fourth Circuit's insistence on proof of an anti-pregnancy bias behind the UPS policy parallels the reasoning of the short-lived *Gilbert* decision. Like

the court below, the *Gilbert* Court faulted the plaintiff for failing to prove that the employer's policy of omitting coverage for pregnancy was a pretext for intentional discrimination. *See Gilbert*, 429 U.S. at 135-36. Instead of finding "invidious" discrimination, the Court found the employer's temporary disability policy was predicated upon a neutral, cost-driven calculus. *Id.* at 130-32, 136; *see also Geduldig*, 417 U.S. at 494 (explaining the state's different treatment of pregnancy as "a policy determination" reflecting cost-based judgments rather than "invidious discrimination").

Taking the same wrong turn, the court below assumed that a neutrally-framed explanation for treating pregnancy worse than other conditions renders it non-discriminatory. But purportedly neutral explanations, such as cost, have always been available to explain the *sui generis* treatment of pregnancy, even as they masked implicit assumptions about women's worth as employees and the effect of pregnancy on worker productivity. *See* Dinner, *Strange Bedfellows*, *supra*, at 476-79 (explaining that cost estimates contained biases about the expected return on employer investments in workers and assumptions about conflicts between work and pregnancy); *id.* at 475-76 (tracking the substitution of cost-based rationales for overt gender stereotyping, once the latter became politically unpalatable). The PDA responded to that history by ensuring that any cost-benefit analysis would be conducted "without the overlay of still prevalent stereotypes and bias about the capacity

of pregnant employees or the likelihood that pregnant employees return to work after childbirth." Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. Davis L. Rev. 961, 1028 (2013). Yet light-duty exclusions also implicitly rely on stereotype-driven assessments of cost to justify including the favored conditions while omitting pregnancy. *Id.* at 1032.

As Congress well understood in enacting the PDA, stereotypes about pregnancy have long shaped employer responses to pregnant workers and workplace policies governing pregnancy, and they continue to do so today. Social science research documents the persistence of gender stereotypes triggered by an employee's pregnancy. *See* Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 68 Duke J. Gender L. & Pol'y 67, 103-107 (2013) (discussing social science research on pregnancy and maternity bias in the workplace). Some of these stereotypes are descriptive, ascribing to pregnant workers a lower level of competence and a reduced commitment to the workplace. *See* Grossman, *supra*, at 577 (collecting and describing studies); Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 Hastings L.J. 1359, 1369-72 (2008) (same). Others are prescriptive, prioritizing women's maternal functions and devaluing women's roles as workers. *See* Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97, 103-104

(2013) (citing studies). The PDA responds to both sets of stereotypes by ensuring that pregnant women have the same rights to work, and under the same conditions, as other employees with conditions similarly affecting work capacity.

In failing to grasp the discriminatory treatment in UPS's policy, the court below misunderstood the theory at the heart of the PDA. Both proponents and opponents of the Act understood that contested assumptions about pregnant workers were at the heart of the fight over the baseline by which to set the nondiscriminatory treatment of pregnancy. The Act's detractors grounded their arguments in traditional views about women, especially mothers, as "'marginal participants in labor markets.'" Franklin, *supra*, at 1321; *see also id.* at 1336 n.140 (citing arguments employers made to the EEOC in 1965, urging a narrow definition of sex discrimination because women leave the workforce when they marry and employer investments in worker training are lost). PDA proponents made their case for the legislation by highlighting the significance of gender stereotypes about pregnancy to women's equal rights at work. *See* Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 Yale J.L. & Feminism 1, 12 (2009) (citing testimony and views of PDA proponents). As Wendy Williams, a key proponent of the PDA, explained the backdrop to the legislation:

> Pervasively, pregnancy was treated less favorably than other physical conditions that

> affected workplace performance. The pattern of rules telegraphed the underlying assumption: a woman's pregnancy signaled her disengagement from the workplace. Implicit was not only a factual but a normative judgment: when wage-earning women became pregnant they did, and should, go home.

Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 335 (1984-85).

Employers' differential treatment of pregnancy was a key part of the systemic stereotyping to which the PDA responded: the refusal to treat pregnant women as "real" workers. *See* Williams et al., *A Sip of Cool Water*, *supra*, at 103 ("women who seek accommodations for a condition arising out of pregnancy frequently meet with hostility fueled by gender stereotyping"). The Second Clause is a corrective to a particular form of pregnancy discrimination that took shape historically – and, as this case makes clear, persists. As employers developed more generous benefit plans in order to attract skilled labor in response to a tightening labor market, they exempted pregnant workers from these benefits, seeing them as poor investments, more likely to leave the workplace and be supported by a male breadwinner. *See* Dinner, *Strange Bedfellows*, *supra*, at 496-97 & n.188 (citing PDA opponents' arguments that pregnant women leave the workplace); *id.* at 498 (noting opponent's argument that disability benefits should be reserved for family providers and "women are not breadwinners"). This

same gender ideology underlay the state's argument in *Geduldig*, defending its omission of pregnancy on the ground that women return to work after pregnancy at lower levels than workers recovering from other conditions. *See* Oral Argument at 15:17, *Geduldig v. Aiello*, 417 U.S. 484 (1974) (No. 73-640), *available at* http://www.oyez.org/cases/1970-1979/1973/1973_73_640 (" there is a major difference in the return to work rate following disability from pregnancy"); *see also* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 Cinc. L. Rev. 1, 42 (1975) (articulating the Court's implicit rationale in *Geduldig* that "pregnancy-related disability has no place in a worker's benefit program" because "childbirth marks a new period in the woman's life cycle" in which "she should be supported by the family's man, not the state or an employer she is destined to leave").

The same set of gender stereotypes that forced pregnant women out of some jobs altogether (as in the school teacher cases) also prompted employers to adopt workplace policies that treated pregnancy worse than other conditions affecting work capacity. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 Stan. L. Rev. 1871, 1894 (2006) ("Failure to treat pregnant employees 'the same as other persons not so affected but similar in their ability or inability to work' reflects the unconstitutional sex-role stereotype that, as *Hibbs* put it, 'women's family duties trump those of the workplace.'"). These distinct forms of pregnancy discrimination are

interrelated and reinforcing. The unfavorable treatment of pregnancy in workplace policies on benefits and accommodations is an effective way to push pregnant women out of their jobs. *See* Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118, 1123-24 (1986). Both types of discrimination – the outright termination of pregnant employees and workplace policies disfavoring pregnancy from other conditions – are predicated on the same stereotypical view of women as mothers first, workers second. *See Coleman v. Ct. of Appeals*, 132 S. Ct. 1327, 1343 (2012) (Ginsburg, J., dissenting) (citing witness in PDA hearings articulating the gender ideology behind pregnancy discrimination, that "women are mothers first, and workers second"); *id.* at 1345 (discussing the gender stereotypes about women's commitment to the workforce that underlie pregnancy discrimination).

These stereotypes continue to have traction through the policies of employers, like UPS, that refuse light-duty accommodations for pregnancy, despite granting them to workers with other conditions similarly affecting work. *Cf.* Finley, *supra,* at 1136 (discussing the stereotypes underlying employer refusals to fold pregnancy into workplace policies on the same terms as other conditions, including: that pregnancy is a voluntary, natural choice for women; that employers should not have to bear the costs of covering it; and that doing so would be unfair to the "real" workers deserving of such benefits).

Despite these core lessons of the PDA, the court below stubbornly and repeatedly referred to the PDA's directive in the Second Clause as requiring "preferential" treatment for pregnancy or, even more derisively, "most favored nation" status. Pet. App. 19a-23a; *see also Reeves*, 446 F.3d at 642 (rejecting plaintiff's challenge to discriminatory light-duty policy as asking for "preferential treatment"); *Urbano v. Continental Airlines*, 138 F.3d 204, 208 (5th Cir. 1998) (same); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (same). This disparaging terminology itself bespeaks a grave misunderstanding of the PDA and reinstates the very stereotypes about work and pregnancy that the Act was designed to eradicate. *See* Williams et al., *A Sip of Cool Water*, *supra*, at 103-104 (tracing courts' "intuition that pregnant women are asking for 'special treatment'" to gender-stereotyped views linking the costs of accommodating male workers to the "ordinary costs of doing business," but costs associated with pregnancy as "something extra that employers should not have to shoulder"). Indeed, the *Gilbert* Court used this exact same baseline, classifying the excision of pregnancy from the employer's benefit plan as neutral – and by extension, rendering any inclusion of pregnancy alongside the favored conditions to be special treatment. *Gilbert*, 429 U.S. at 134-35.

Congress rebuked this very reasoning when it enacted the PDA. The Act responded to the flawed view that pregnancy is "unique" by isolating the effects of pregnancy on one's capacity to work as the

proper point for comparison. *Cf.* Katharine T. Bartlett, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 Cal. L. Rev. 1532, 1536 (1974) (" pregnancy's unique identifiability facilitates drafting laws and regulations based on exactly those generalizations, stereotypes, and assumptions that constitutional doctrine in the area of sex discrimination was intended to curb."). By honing in on the work effects of pregnancy, the PDA drives home the key lesson that, in its effects on work, pregnancy is not unique after all, but one part of a broad complex of human conditions that affect work capacity. *See* Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 Women's Rts. L. Rep. 175, 193 (1982). The Second Clause instructs that treating pregnancy as well as other conditions with a similar effect on work is not special treatment, but rather the very definition of what it means not to discriminate on the basis of pregnancy.

The decision below and others like it veer so far off course in part because they insist on shoehorning all PDA claims into the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), pretext proof framework, which was designed to smoke out discriminatory intent from circumstantial evidence. Pet. App. 25a-29a; *see also* Widiss, Gilbert *Redux*, *supra*, at 1018-26 (discussing and critiquing lower courts' use of this framework in rejecting PDA challenges to discriminatory accommodation policies). While the pretext model is applicable to pregnancy discrimination cases if the contested issue is whether the plaintiff's

pregnancy was the reason for the adverse action taken against her, it is not necessary in cases like this one, where the employer admits to treating pregnancy worse than other conditions with a similar effect on work. *See* Williams, *Equality's Riddle*, *supra*, at 349 ("With *Newport News*, *Gilbert*'s conceptual framework is definitively interred. Pregnancy-based rules prima facie violate Title VII. The more complicated inquiries [of pretext] are now irrelevant."); *cf. id.* at 349 n.101 (noting the continuing viability of the pretext model where the adverse action is not taken pursuant to an employer policy, but allegedly based on a covert intent to discriminate because of pregnancy); Joanna L. Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the PDA's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 36 (2009) (arguing that exclusionary light-duty policies constitute per se disparate treatment). In the case below, there was no need to "smoke out" the employer's intent behind its differential treatment of pregnancy. Proof that the employer grants light-duty work for other conditions with a similar effect on work, but not for pregnancy, establishes the violation. *See* EEOC Guidance, *supra*, at 12 ("A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green* in order to establish a violation of the PDA where there is evidence that a pregnant employee was denied a light-duty position provided to other employees who are similar to the pregnant employee in their ability to work.").

Even though the *McDonnell-Douglas* model and its prima facie case might be sufficiently modified to fit the fact patterns in the refusal-to-accommodate cases, there is no reason to do so. Filtering the evidence through the prima facie case, followed by the employer's proffer of a legitimate non-discriminatory reason for the differential treatment of pregnancy, and culminating in an inquiry into whether the proffered reason is a pretext for discrimination, is unnecessarily formalistic and encourages courts to focus on the wrong issue: the employer's subjective mindset in treating pregnancy differently.[3] The text of the Second Clause leaves no room for a distinction based on the source of the condition to masquerade as a legitimate non-discriminatory reason. *See* Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95-331, at 4 (1977) ("the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work"); EEOC Guidance, *supra*, at 7 ("An employer may not refuse to treat a pregnant worker

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[3] The pretext model continues to be useful, however, in cases where the employer purports to follow a non-discriminatory policy treating pregnancy the same as other conditions similarly affecting work, but plaintiff proves that the asserted pregnancy-neutral reason is actually a pretext for discrimination. *See* EEOC Guidance, *supra*, at 12 (giving example where employer explains denial of light-duty to pregnant worker "based on something other than the source of an employee's limitation," such as a cap on the number of light-duty assignments available, but the plaintiff proves that the employer has waived that cap for non-pregnant workers).

the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)."); *id.* at 12 (stating that a rule differentiating pregnancy from other conditions based on place of injury (on-the-job or not) is not a legitimate nondiscriminatory reason). Accepting a rule about the source of an employee's condition as a legitimate reason for the differential treatment of pregnancy would be to accept "the very stereotype the law condemns." *J.E.B. v. Alabama*, 511 U.S. 127, 138 (1994) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1990)). Nor is it any less of a violation of statutory text if the employer, when it adopted a policy that accommodated other conditions with a similar effect on work, did so out of neglect as opposed to a deliberate, conscious intent to disfavor pregnancy. Unless justified as a BFOQ, it is an unlawful employment practice to treat pregnancy less well than comparable disability, regardless of the employer's motive for doing so. *See Johnson Controls*, 499 U.S. at 199 ("[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

Courts instead should permit plaintiffs to prove pregnancy discrimination directly by establishing the employer's differential treatment of pregnancy compared to other conditions with a similar effect on

work. While the court below opened the door to proving discrimination directly as an alternative to the pretext model, it wrongly grafted onto this method a requirement that the plaintiff provide "direct evidence" of "animus" against pregnancy. Pet. App. 17a-18a, 24a-25a. This compounds the error discussed above, turning a determination of differential treatment into a search for subjective animus. *See* EEOC Guidance, *supra*, at 11 (stating that even without proof of employer statements evidencing anti-pregnancy animus, "a pregnant worker may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in the their ability or inability to work."). Neither the employer's reason for treating pregnancy differently nor the nature of the evidence offered are material. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-99 (2003) (rejecting a "direct evidence" requirement in mixed motive cases because the statute makes no distinction between circumstantial and direct evidence); *see also* EEOC Guidance, *supra*, at 7 ("Pregnant employees seeking to establish that they have not been treated the same as other employees similar in their ability or inability to work can establish unequal treatment through various forms of evidence.").

To the law's detriment, some lower courts, including the court below, have allowed the proof frameworks to become the tail that wags the dog. *Cf.* Sandra F. Sperino, *Rethinking Discrimination Law*,

110 Mich. L. Rev. 69 (2011) (criticizing lower courts' reflexive use of judicially devised proof frameworks in lieu of more straightforward applications of statutory text). In doing so, they have transformed the Second Clause of the PDA from a clear directive to treat pregnancy at least as well as other conditions similarly affecting one's ability to work and into a search for pregnancy-based animus.

III. The Expansion of the Americans with Disabilities Act Will Further Dismantle the PDA if the Court of Appeals' Ruling Is Allowed to Stand.

The rights guaranteed by the PDA are comparative. The PDA does not create any absolute entitlement, but makes the level of treatment due pregnant workers contingent on how the employer treats non-pregnant workers with conditions similarly affecting work. As this Court has explained, "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop. " *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987). Disregarding this directive, the ruling below incorrectly – and inexplicably – placed ADA-accommodated individuals outside the realm of comparison for pregnant workers under the PDA. Pet. App. 18a-19a, 27a. The court was egregiously wrong in doing so.

Under the PDA, the employer's reason for refusing to accommodate pregnant workers despite accommodating non-pregnant workers is not material.

That some non-pregnant workers may be accommodated pursuant to another legal mandate does not remove their treatment as a baseline for pregnant workers. As this Court made clear in the alternative holding in *Guerra*, *if* the PDA had required identical treatment of pregnant and non-pregnant workers in that case, employers could have complied with both the PDA and the California law mandating maternity leave by extending comparable leaves to non-pregnant, similarly affected workers. *Guerra*, 479 U.S. at 290-91. The same reasoning applies to employees entitled to accommodation under the ADA. *See* EEOC Guidance, *supra*, at 7 (a PDA violation may be established by "evidence that reasonable accommodations are provided under the ADA to individuals with disabilities who are similar to a pregnant worker in terms of their ability or inability to work."); *id.* at 11 (Example 10).

Indeed, it would be nothing less than bizarre for the PDA's baseline to depend on whether the employer voluntarily accommodated other conditions or did so solely by force of law. In such a universe, voluntary accommodation of disability would create the obligation to accommodate pregnancy, but the passage of a disability law would eliminate it. The Second Clause permits no such shenanigans and simply makes the minimum level of treatment for pregnant workers depend on the accommodations available to non-pregnant but similarly capable workers. Such an approach would also flatly contradict the PDA's history, including early applications of the Act forcing

employers to extend to pregnancy those benefits that they were already required by law to provide to other conditions similarly affecting work. *See* Widiss, Gilbert *Redux*, *supra*, at 967-68 (discussing the PDA's interaction with other statutory mandates and explaining that the PDA required "leveling up" for pregnancy, "even if an employer's exclusion of pregnancy from disability, health insurance, sick day, or other policies was due to pregnancy-neutral factors, such as compliance with other statutory mandates"); *id.* at 1019-20 (discussing early EEOC guidance to this effect). The ADA should not be turned into a sinkhole for pregnant workers.

The lower court's reasoning, which was troubling under the original ADA, is even more so after the 2008 Amendments ("ADAAA"), which amended the ADA to require accommodation of a wider range of disabilities than under court interpretations of the original ADA. 42 U.S.C. §12101(2)(A) (2012); *see also* EEOC Guidance, *supra*, at 15 ("Congress made clear in the [ADAAA] that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage."). The ADAAA and its regulations now require reasonable accommodations for a broad range of impairments, including those that substantially limit a person's ability to lift, walk, stand or bend, even if such limitations are temporary in duration. *See* 42 U.S.C. §12101(2)(A) (2012) (identifying major life activities for which substantial impairment would qualify an individual for coverage); 29 C.F.R.

§1630.2(i) & (j)(ix) (2012) (explaining the standard for impairment under the Amendments and stating that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section"); 29 C.F.R. pt. 1630 app. (2012) (similar).

The ADAAA's expansion of the class of workers entitled to accommodations should, by virtue of the baseline set in the PDA, raise the floor for pregnant workers with a similar ability or inability to work. *See* EEOC Guidance, *supra*, at 3 n.11 ("The expanded definition of 'disability' under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged."). If the ADAAA requires accommodation, for example, for a worker with temporary lower back pain, a pregnant worker with a similar limitation should receive the same accommodation. The court below, however, wrongly concluded that workplace accommodations required by the ADA are not appropriate comparison points for the treatment of pregnant workers under the PDA.

If upheld, the lower court's ruling would give the ADAAA the "perverse effect of decreasing employers' obligations to pregnant employees by reducing significantly the pool of potential comparators considered under a PDA claim." Widiss, Gilbert *Redux*, *supra*, at

964-65; *see also* EEOC Guidance, *supra*, at 8 (comparing the kinds of disabling conditions now requiring reasonable accommodation under the ADAAA to similar effects on work resulting from pregnancy). A law designed to help one set of workers with disabilities would then have the shocking and unintended effect of nullifying the Second Clause of the PDA.

There is nothing in the original or amended ADA to support this interpretation, and this Court has repeatedly admonished that legislative repeals by implication are strongly disfavored. *See Cook County v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003); *Hagen v. Utah*, 510 U.S. 399, 416 (1994); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) (" when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). This is all the more true since the two statutes share a common purpose: ensuring that employees with health conditions are not unreasonably excluded from the workplace.

The lower court's confusion in handling the intersection of the PDA and the ADA stems in part from its incorrect assumption that the temporary nature of pregnancy makes it incomparable to lasting disabilities. Pet. App. 27a. However, nothing in the PDA makes the temporary duration of pregnancy necessarily incommensurate with such conditions.

The similarity that counts is the effect on an employee's ability to work. *See* Brake & Grossman, *supra*, at 96-97 (explaining references to "temporary" disabilities in the PDA's legislative history). For example, an employer may violate the PDA by permitting an employee with type 2 diabetes but not a pregnant employee to take frequent snack breaks, even though pregnancy is temporary and type 2 diabetes is not. The critical inquiry is whether the employer treated pregnancy less favorably than it treats a non-pregnant worker with a condition having a similar effect on work.

IV. The Fourth Circuit's Approach Makes the PDA an Ineffective Remedy for Women in Need of Its Protection.

An undeservedly narrow reading of the PDA will have a particularly adverse impact on women who most need its protection: women in non-traditional occupations and low-wage working women.[4] The discriminatory denial of accommodations to pregnant workers impedes sex integration of the labor market, relegating women to low-wage, female-dominated jobs with little security.

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[4] As used here, the term "non-traditional occupations" encompasses all occupations where one sex constitutes more than 75 percent of the labor force. *See* Women's Bureau, U.S. Dept. of Labor, *Nontraditional Occupations of Employed Women in 2010*, at 1 n.1 (Aug. 2010), *available at* http://www.dol.gov/wb/stats/NontraJobs_2010.htm.

Many jobs remain heavily segregated by sex. Women *already* face substantial obstacles to traditionally male-dominated jobs, *see* Ariane Hegewisch & Heidi Hartmann, *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, Institute For Women's Policy Research at 4-6 (Jan. 2014) (noting that "some of the most common occupations for either women or men" remain highly segregated). Jobs traditionally held by women are generally low paying. *See* U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey* (2014) (noting that traditionally male-dominated jobs pay significantly higher wages than occupations with a predominantly female workforce); U.S. Census Bureau, *American Community Survey* (2012) (comparing, for example, median earnings in male-dominated protective services occupation of $48,836 with median earnings in female-dominated personal care occupation of $23,141). Thus, working in traditionally male dominated jobs offers women, particularly women lacking advanced degrees, a rare avenue to middle class earnings. The inability to retain a non-traditional job due to non-accommodation of pregnancy is thus a particularly grave loss to working class women who have few other opportunities to earn a living wage for themselves and their families.

The likelihood of conflicts between pregnancy and work, however, is particularly pronounced in traditionally male-dominated jobs. For example, women in non-traditional occupations are particularly susceptible to exposure to hazardous substances

such as chemicals, gas, dust, fumes, or radiation. *See* Grossman & Thomas, *supra*, at 19 (2009) (citing studies). Pregnant firefighters may face exposure to toxins contained in fire smoke, including carbon monoxide, benzene and other irritant and asphyxiate gasses with a potentially negative impact on fetal health. *See* Melissa A. McDiarmid et al., *Reproductive Hazards of Fire Fighting II: Chemical Hazards*, 19 Am. J. of Industrial Medicine 447, 451-62 (1991). Non-traditional occupations are also more likely to require strenuous physical activity, some of which may be contraindicated for certain phases of pregnancy. For example, a seven-months-pregnant police officer may find it challenging to pursue a suspect in a foot chase. *See* Karen J. Kruger, *Pregnancy and Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 Wisc. Women's L.J. 61, 70 (2006). Non-traditional occupations also frequently involve work conditions that can interfere with pregnancy, such as irregular hours or night shifts. *See* Clair Infante-Rivard et al., *Pregnancy Loss and Work Schedule During Pregnancy*, 4 Epidemiology 73 (1993) (concluding that the risk of preterm delivery is more than twice as high among women who work night shifts relative to women on fixed day schedules). Given these constraints, lack of pregnancy-related accommodations can significantly erode women's ability to both obtain and retain higher-wage, male-dominated jobs.

Beyond facing a higher risk of conflict between pregnancy and work, women in non-traditional

occupations are also especially vulnerable to pregnancy discrimination. Although several studies have found stereotyping and bias against pregnant employees and applicants, *see, e.g.*, Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. Org'l Behav. 649 (1993) (finding substantial negative stereotyping against pregnant workers, resulting in significantly more negative performance appraisals of pregnant workers, especially by male reviewers); Michelle Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards That Maintain Traditional Roles*, 92 J. of Applied Pscyh. 1499, 1507 (2007) (finding hostile reactions to pregnant job applicants despite benevolent reactions to pregnant customers), such negative reactions are even stronger when pregnant applicants pursue jobs traditionally held by men. *See* Hebl, *supra*. Women who enter non-traditional fields are more likely to encounter entrenched institutional sexism stemming from doubts about their professional competence. For instance, women who enter law enforcement "face tremendous difficulties" because their male colleagues "doubt that women are equal to men in performing job skills, fear that women cannot do 'real' police work, and have concerns about women's 'emotional fitness.'" Kruger, *supra*, at 67; *cf.* Corina Schulze, *Institutionalized Masculinity in US Police Departments: How Maternity Leave Policies (or Lack Thereof) Affect Women in Policing*, 23 Crim. J. Stud. 177, 179-180 (2010) (discussing ways in which the police departments' "masculine value system"

contributes to the underrepresentation of women in those departments). Pregnancy heightens these concerns, increasing women's risk of being forced out and making pregnancy-related accommodations both rare and vital to the women in these jobs.[5] It is important to remember that claims under the Second Clause arise only when an employer accommodates other physical limitations or injuries but refuses to provide the same level of support to pregnancy. But if an employer makes a light-duty position available for a worker with an injured back, the employer should also be able to make a light-duty position available for a pregnant employee with back pain or a lifting restriction.

Regardless of the type of occupation, the Fourth Circuit's interpretation of the PDA is especially harmful to low-income women, the group Congress was particularly concerned with when it passed the PDA. *See* H.R. Rep. No. 95-948, at 3 (1978) (noting that "the assumption that women will become pregnant and leave the labor force is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs").

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[5] PDA-related litigation indeed suggests that conflicts tend to arise with particular frequency in non-traditional occupations. *See e.g. Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir. 2006) (delivery truck driver); *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996) (police officer); *Dimino v. New York City Transit Auth.*, 64 F. Supp. 2d 136 (E.D.N.Y. 1999) (transit police officer); *Spees v. James Marine, Inc.*, 617 F.3d 380 (6th Cir. 2010) (welder).

Women in low-wage jobs remain highly vulnerable to the harms of non-accommodation. First, like women in non-traditional occupations, women in low-wage jobs are more likely to experience conflicts between pregnancy and work because they work in physically demanding jobs or highly regimented workplaces. *See* Grossman, *supra*, at 578-83. Second, low-wage women are less likely to be granted even minor and costless accommodations and thus more likely to be forced out because of these conflicts. *See* Stephanie Bornstein, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers*, University of California, Hastings College of the Law Center for Worklife Law (2011), at 2, *available at* http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf (concluding that many pregnant low-wage workers are "fired on the spot or immediately after announcing a pregnancy, banned from certain positions no matter what their individual capabilities to do the job, and refused even small, cost-effective adjustments that would allow them to continue with work throughout their pregnancies"); Paula McDonald et al., *Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress*, 39 Indus. Rel. J. 229, 237 (2008) (study finding that most cases of pregnancy discrimination occurred in low-wage occupations); *cf. Wiseman v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 48020, at *1 (D. Kan. July 21, 2009) (store policy barred pregnant fitting room monitor from carrying a water bottle at work despite recommendation from doctor). Moreover, given rigid work schedules with

parsimonious leave policies, low-wage workers find it challenging to take time off for necessary medical appointments. *See* Bornstein, *supra*, at 6 (noting that "less than one-third of working parents with incomes under $28,000 ha[ve] access to flexible workplace scheduling"); *see also* Bureau of Labor Statistics, *Employee Benefits in the United States – March 2014* (July 25, 2014), *available at* http://www.bls.gov/news.release/pdf/ebs2.pdf (noting that only 21 percent of workers in the bottom 10 percent of wage-earners have access to paid sick days). Accordingly, court interpretations that minimize protections of the PDA exacerbate already difficult conditions for low-wage working women.

The plight of a low-income woman segregated out of a higher-wage, male-dominated job into the equally strenuous low-wage one based on her reproductive capacity is far from novel. As far back as a century ago, pregnancy was the common basis for "'protecting' female employees out of jobs desirable to males." Deborah L. Rhode, *Speaking of Sex: The Denial of Gender Inequality* 34 (1997). Giving the PDA its due is not just a matter of doing justice to the plain language of the statute. It is vital to putting an end to the longstanding unjust treatment of working women, particularly ones who perform "men's jobs," or who work for low wages.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's ruling should be reversed.

Respectfully submitted,

JELENA KOLIC
Staff Attorney
LEGAL MOMENTUM
5 Hanover Square
Ste. 1502
New York, NY 10004
(212) 413-7522

JOANNA L. GROSSMAN
Counsel of Record
Sidney & Walter Siben
Distinguished Professor
of Family Law
HOFSTRA LAW SCHOOL
121 Hofstra University
Hempstead, NY 11549
(516) 463-5241
lawjlg@hofstra.edu

DEBORAH L. BRAKE
Professor of Law and
Distinguished Faculty Scholar
UNIVERSITY OF PITTSBURGH
SCHOOL OF LAW
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 648-2655

September 10, 2014

Appendix A

The *Amici* have substantial expertise in employment discrimination law and issues relating to women's workplace equality. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. For professors, their institutional affiliations are listed for identification purposes only.

Organizations

Legal Momentum (formerly NOW Legal Defense and Education Fund) has been at the national forefront of the movement to advance women's rights for more than forty years. As part of this work, Legal Momentum has particularly focused on eliminating unjust barriers to women's economic security, such as pregnancy discrimination. To combat pregnancy discrimination, Legal Momentum advocates through the legal system and in cooperation with government agencies and policy makers. In addition, Legal Momentum routinely represents women working in nontraditional or low-wage jobs who have been denied light duty positions while pregnant. It is Legal Momentum's position that interpreting the Pregnancy Discrimination Act to require employers to accommodate pregnant workers when such accommodations are available to other workers is vital to eradicating pregnancy-based workplace discrimination.

Equal Rights Advocates (ERA) is a national women's advocacy organization based in San Francisco,

California. Founded in 1974, ERA's mission is to protect and expand economic and educational access and opportunities for women and girls. ERA employs a three-pronged approach to achieving its mission: public education, policy advocacy, and litigation. ERA is committed to assisting working women who face myriad workplace challenges. In furtherance of that objective, ERA has been involved in historic impact litigation, including two of the first pregnancy discrimination cases, Geduldig v. Aiello, 417 U.S. 484 (1974), and Richmond Unified Sch. Dist. v. Berg, 434 U.S. 158 (1977), as well as the more recent AT&T Corp. v. Hulteen, 556 U.S. 701 (2009). ERA's nationwide multi-lingual hotline serves hundreds of women every year and helps them navigate these challenges. Calls from workers facing pregnancy discrimination are on the rise, and ERA has a strong interest in ensuring that women are adequately protected by a fair application of the Pregnancy Discrimination Act (PDA) by courts.

The Maurice and Jane Sugar Law Center for Economic and Social Justice is a national non-profit law center extensively engaged in labor and employment law litigation, including gender and pregnancy discrimination. The Sugar Law Center is deeply interested in this case because its outcome affects the right of thousands of women workers employed in traditionally male workplaces and the ongoing harms occurring to women workers who become pregnant while working. The judgment of amici is based on over 15 years experience in public

interest advocacy and representation on behalf of workers before administrative agencies and federal and state courts throughout the country. Our experience includes one of the first cases in the Midwest directly confronting the issues arising in this case, and is based on a history and mission of public advocacy that has included contacts with state and local elected officials who have sought understanding of the issues before the court in the present matter.

Public Justice, P.C. (Public Justice) is a national public interest law firm dedicated to pursuing justice for the victims of corporate, governmental, and individual wrongdoing. It works to advance civil rights and civil liberties, employees' rights, consumers' and victims' rights, environmental protection, access to justice, and the protection of the poor and the powerless. Public Justice has prosecuted a wide range of gender discrimination and workers' rights cases. It is devoted to ensuring that women and men are treated equally, that pregnant and non-pregnant workers are treated equally on the basis of their ability to work, and that the Pregnancy Discrimination Act is interpreted to mean what it says.

The Union for Reform Judaism (URJ) including 900 congregations in North America encompassing 1.3 million Reform Jews, the **Central Conference of American Rabbis** (CCAR), whose membership includes more than 2000 Reform rabbis, and the **Women of Reform Judaism** that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this

issue out of a longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life.

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to improving the legal and economic status of women and their families through litigation, public policy initiatives, public education, and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination by bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. WLP assists women who have been victims of pregnancy discrimination in employment through its telephone counseling service and through direct legal representation. The WLP has a strong interest in the proper application of the Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.

Professors

Barbara Babcock
Judge John Crown Professor of Law, Emerita
Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Deborah L. Brake
Professor of Law and Distinguished Faculty Scholar
University of Pittsburgh School of Law
3900 Forbes Avenue
Pittsburgh, PA 15260

Sarah E. Burns
Professor of Law
Faculty Director
Carr Center for Reproductive Justice
NYU School of Law
245 Sullivan St. 5th Floor
New York, NY 10012

Martha Chamallas
Robert J. Lynn Chair in Law
Moritz College of Law
The Ohio State University
55 W. 12th Ave.
Columbus, OH 43201

Jessica A. Clarke
Associate Professor
University of Minnesota Law School
229-19th Avenue S.
Minneapolis, MN 55455

Jeannette Cox
Professor of Law
University of Dayton
300 College Park
Dayton, OH 45469-2772

Deborah Dinner
Associate Professor of Law
Washington University School of Law
Campus Box 1120, One Brookings Drive
St. Louis, MO 63130

Maxine Eichner
Reef Ivey II Professor of Law
UNC School of Law
CB #3380 Van Hecke-Wettach Hall
Chapel Hill, NC 27599-3380

Sally Frank
Professor of Law
Drake University School of Law
2621 Carpenter Avenue
Des Moines, IA 50311

Cary Franklin
Assistant Professor
University of Texas School of Law
727 East Dean Keeton St.
Austin, TX 78705

Leon Friedman
Joseph Kushner Distinguished Professor
of Civil Liberties Law
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

Tristin Green
Professor of Law & Dean's Circle Scholar
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117-1080

Joanna L. Grossman
Sidney & Walter Siben Distinguished Professor
of Family Law
Hofstra Law School
121 Hofstra University
Hempstead, NY 11549

Grant Hayden
Professor of Law
Maurice A. Deane School of Law
121 Hofstra University
Hempstead, NY 11549

Jennifer S. Hendricks
Associate Professor
University of Colorado Law School
Wolf Law Building, 401 UCB
Boulder, CO 80309

Herma Hill Kay
Barbara Nachtrieb Armstrong Professor of Law
School of Law (Boalt Hall)
University of California
Berkeley, California 94720

Laura Kessler
Professor of Law
University of Utah
College of Law
332 South 1400 East
Salt Lake City, UT 84112

Sylvia A. Law
Elizabeth K. Dollard Professor of Law,
Medicine and Psychiatry
NYU Law School
40 Washington Sq. So., Rm. 429
New York, N.Y. 10012

Marcia McCormick
Associate Professor of Law
Saint Louis University School of Law
3800 Lindell Blvd.
Saint Louis, MO 63108

Ann C. McGinley
William S. Boyd Professor of Law
William S. Boyd School of Law
University of Nevada, Las Vegas
4505 Maryland S. Parkway – Box 451003
Las Vegas, NV 89154

Nicole Buonocore Porter
Professor of Law
University of Toledo College of Law
2801 W. Bancroft St., MS #507
Toledo, OH 43606

Deborah Rhode
Ernest W. McFarland Professor of Law
Director, Center on the Legal Profession
Director, Program on Social Entrepreneurship
at Stanford University
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305

Susan Deller Ross
Professor of Law
Georgetown Law School
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Kerri L. Stone
Associate Professor of Law
Florida International University
College of Law
University Park
11200 S.W. 8th Street
RDB 2041
Miami, FL 33199

Michelle A. Travis
Professor of Law
University of San Francisco School of Law
2130 Fulton Street
San Francisco, CA 94117

Deborah Widiss
Associate Professor
Indiana University Maurer School of Law
211 S. Indiana Ave.
Bloomington, IN 47405

Verna Williams
Judge Joseph Kinneary Professor of Law and
Co-Director of the Center for Race, Gender,
and Social Justice
University of Cincinnati College of Law
P.O. Box 210040
Clifton Ave. & Calhoun St.
Cincinnati, OH 45221-0040

Wendy Webster Williams
Professor Emerita
Georgetown Law School
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Noah Zatz
Professor of Law
UCLA School of Law
Box 951476
Los Angeles, CA 90095-1476

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Wade J. Henderson
Lisa M. Bornstein
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
1629 K Street, NW, 10th Fl.
Washington, DC 20006
(202) 466-3311
bornstein@civilrights.org

Maria T. Vullo
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3346
mvullo@paulweiss.com

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, The Leadership Conference on Civil and Human Rights ("The Leadership Conference"), is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. Founded in 1950 by three legendary leaders of the civil rights movement, The Leadership Conference is the nation's oldest, largest, and most diverse civil and human rights coalition. Its member organizations represent people of all races, ethnicities and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals. For more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference was a leader in the efforts to pass both the Americans with Disabilities Act ("ADA") of 1990 and the Americans with Disabilities Act Amendments Act ("ADAAA") of 2008.

The Leadership Conference believes that all workers deserve to have a workplace free from discrimination and to that end seeks to ensure that

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[1] The parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, the *amicus curiae* states that no counsel for a party has authored this brief, in whole or in part, and no entity, other than the *amicus curiae*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

the equal opportunity and fairness protections of the Pregnancy Discrimination Act ("PDA") are afforded to all pregnant workers, particularly low-income women and women of color who would be disproportionately impacted by an interpretation of the PDA that fails to protect them from job loss due to pregnancy. The Leadership Conference believes that an interpretation of the PDA that permits employers to refuse to accommodate pregnant workers while providing accommodations to others similar in their ability or inability to work jeopardizes the important legal protections guaranteed to pregnant women under the PDA and the ADA.

BACKGROUND

Petitioner Peggy Young began working for Respondent United Parcel Service, Inc. ("UPS") in October 1999, when she was 27 years old. *Young* v. *United Parcel Service, Inc.*, No. DKC 08-2586, 2011 WL 665321, *1 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013). In 2002, Ms. Young began working as a part-time early-morning air driver. *Id.* Although the job description required the ability to "'lift, lower, push, pull, leverage and manipulate' letters and packages 'weighing up to 70 pounds,'" the need to maneuver packages even close to 70 pounds rarely arose. *Id.*

After working for UPS for six years, Ms. Young and her husband decided to have a third child and in July 2006, she began an approved, unpaid leave to undergo in vitro fertilization and then became pregnant. *Young* v. *UPS*, 707 F.3d 437, 441 (4th Cir. 2013). Given difficulties with earlier pregnancies, Ms. Young got permission to extend her leave, as

provided by the Family and Medical Leave Act ("FMLA"), to October 2006. *Young*, 2011 WL 665321 at *6.

In October 2006, Ms. Young informed her supervisor that she was ready to return to work, but that, according to her doctor, her pregnancy prevented her from lifting more than 20 pounds. *Id.* at *5. Ms. Young's supervisor informed her that—unlike employees with on-the-job injuries, ADA-qualifying disabilities, or who had lost their Department of Transportation ("DOT") certification due to on-the-job or off-the-job conditions, for whom UPS sometimes made "light duty" work accommodations—the company refused to provide such accommodations for pregnancy-related needs. *Id.* at *5. Ms. Young explained that she needed the income and benefits provided by her employment and that she wanted to work. Response in Opposition to Motion for Summary Judgment, Statement of Peggy Young at 4, *Young*, 2011 WL 665321, ECF 76-16 (hereinafter "Young Stmt."). Ms. Young's supervisor advised that Ms. Young was ineligible for any accommodation unless she could provide a doctor's note saying that she was completely disabled. *Young*, 2011 WL 665321 at *6. Ms. Young never made such a request because she believed that she was physically capable of working and wanted to do so. Young Stmt. at 4. In November 2006, a senior manager informed Ms. Young that she should not return to work until she was no longer pregnant, because she was "too much of a liability." *Young*, 2011 WL 665321 at *6. As a result, Ms. Young lost her income and medical coverage. *Id.*

On April 29, 2007, Ms. Young gave birth to her daughter, and returned to work at UPS two months later, on June 26, 2007. *Id.* During Ms. Young's forced absence from work, she received no pay or medical or pension benefits. *Id.*

Seeking a remedy for UPS's refusal to accommodate her pregnancy-related restrictions, and after exhausting her administrative remedies, Ms. Young filed suit in the United States District Court for the District of Maryland alleging, among other claims, violations of the PDA. *Id.* Ms. Young asserted that UPS's refusal to accommodate her pregnancy-related restrictions in the same way that UPS accommodated other employees similar in their ability or inability to work presented both direct and circumstantial evidence of discrimination under Title VII. The district court granted summary judgment in favor of UPS in February 2011. *Id.* at *9.

The United States Court of Appeals, Fourth Circuit affirmed, concluding that UPS had "crafted a pregnancy-blind policy," even though that very policy resulted in a pregnant Ms. Young being forced to leave her job without pay and medical benefits while other workers with similar limitations in ability to work not arising out of pregnancy were accommodated. 707 F.3d at 446. The court of appeals held that Ms. Young failed to identify an appropriate comparator under the *McDonnell Douglas* burden-shifting framework, summarily dismissing workers with an ADA-qualifying disability as comparators, on the ground that Ms. Young's limitation was "temporary and not a significant restriction on her ability to perform major life activities." 707 F.3d at 450. The court of appeals

held that workers injured on the job and drivers who lost their DOT certification are similarly inapposite as comparators.

This Court granted Ms. Young's petition for a writ of certiorari on July 1, 2014.

SUMMARY OF ARGUMENT

The PDA mandates that employers must treat pregnant women "the same" as other employees "similar in their ability or inability to work." In absolving UPS of this obligation, the court of appeals' reading of the PDA was erroneous and must be reversed.

The court of appeals disregarded the plain language of the PDA, which defines the universe of similarly situated employees for assessing a PDA claim as other employees "similar in their ability or inability to work." Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012). In failing to find direct evidence or a *prima facie* case of discrimination based on UPS's policy of accommodating employees injured on the job, ADA-qualifying employees, or employees decertified by the DOT, the court of appeals misapprehended the nature of the inquiry required by the PDA, which focuses on a pregnant woman's *ability* to work, not on the *cause* of the restriction. A plain reading of the statute, and of the Equal Employment Opportunity Commission ("EEOC") Guidelines interpreting the PDA, requires that the court of appeals' decision be reversed.

Moreover, in holding that Ms. Young failed to establish a *prima facie* case of discrimination, the

court of appeals incorrectly held that ADA-qualifying employees could never be appropriate comparators for pregnant workers for purposes of a PDA claim. Such a categorical exclusion violates both the text and intent of the PDA. Indeed, courts of appeals have used individuals accommodated under the ADA as comparators in other employment discrimination contexts, relying on—as the PDA mandates—the nature of the accommodation needed rather than the status of the individuals being accommodated.

Finally, this Court should reject the court of appeals' cramped and misguided reading of appropriate comparators under the PDA and instead defer to the EEOC's guidance on the identification of appropriate comparators for a PDA claim. As the agency charged with ensuring that employers adhere to Title VII's mandate, the EEOC has repeatedly implemented guidelines for the PDA that are consistent with a plain language interpretation of the PDA. Because the EEOC's guidance regarding the PDA is validly reasoned, thoroughly considered, and consistent with both the plain text of the statute and the EEOC's other statements on the PDA, this Court should reject the court of appeals' contrary reading of the PDA and defer to the EEOC's interpretation under this Court's decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE PLAIN LANGUAGE AND CLEAR PURPOSE OF THE PREGNANCY DISCRIMINATION ACT.

The court of appeals erred in holding that Ms. Young could not use as a comparator a fellow employee accommodated under a UPS policy. Specifically, the court of appeals mistakenly concluded that: (1) UPS's practice of accommodating non-pregnant employees with similar work restrictions was not direct evidence of discrimination, and (2) pregnant employees cannot allege a *prima facie* case of sex discrimination by using employees injured on the job, ADA-qualifying employees, or DOT-decertified employees as comparators under the *McDonnell Douglas* framework.[2] *Young*, 707 F.3d at 445-51. In so holding, the court of appeals

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[2] A plaintiff may make a disparate treatment claim under the PDA and Title VII by showing either direct evidence of discrimination or by proffering evidence sufficient to prove a *prima facie* case of discrimination under the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). To make out a *prima facie* case of sex discrimination, a required element under *McDonnell Douglas*, a plaintiff must prove: "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly situated employees outside the protected class received more favorable treatment." *Gerner* v. *Cnty of Chesterfield, VA*, 674 F.3d 264, 266 (4th Cir. 2012) (internal citations and punctuation omitted).

disregarded the plain language of the PDA, which requires that, to prove a violation of the statute, a plaintiff need only identify other employees, similar in their ability to work, who were granted accommodations that were denied the pregnant employee.[3]

A. The Plain Language of the PDA Identifies the Appropriate Pool of Comparators for Pregnant Employees.

Passed in 1978 as an amendment to Title VII of the Civil Rights Act of 1964, the PDA expanded the definition of sex discrimination to include pregnancy and articulated that pregnant employees who are limited in their ability to work must be treated in the same manner as similarly situated non-pregnant employees with limitations. The statute's first clause included pregnancy claims within the ambit of sex discrimination under Title VII and the second clause set forth the pool of similar employees—or appropriate comparators—to evaluate whether a pregnant woman is being "treated the same" at work.

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[3] A plaintiff who has established that an employer has failed to treat a pregnant woman the same as a non-pregnant employee similar in his or her ability or inability to work need not resort to the *McDonnell Douglas* framework to state a claim. Under either method of stating a claim—direct evidence or a *prima facie* case—the PDA establishes the class of employees to be compared to the pregnant woman making a claim. *See EEOC Enforcement Guidance: Pregnancy Discrimination & Related Issues*, Notice No. 915.003 at Sec. C. (July 14, 2014).

By the statute's plain terms, the test for a PDA claim is whether the non-pregnant employee who is accommodated is similar in his or her "ability to work," and not whether the pregnant employee's impairment derives from the same cause, or is expected to be of the same duration, or whether it affects the pregnant employee's abilities outside of work. Specifically, the PDA mandates that:

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, *as other persons not so affected but similar in their ability or inability to work.*

42 U.S.C. § 2000e(k) (emphasis added).

This Court has observed that the PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 684 (1983). Likewise, this Court has acknowledged that the statute's second clause—setting forth the mandate that pregnant employees "be treated the same" as other employees "similar in their ability or inability to work"—"was intended to illustrate *how* discrimination against pregnancy is to be remedied." *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) (emphasis added). Applying this mandate, other courts have recognized that the comparator question in a PDA claim does not focus on the nature or cause of the employee's medical condition, but rather on how the condition affects the

employee's ability to work. *See Ensley-Gaines* v. *Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) ("[T]he PDA requires *only* that the employee be similarly situated in his or her 'ability or inability to work.'") (emphasis added).

The statute's language is simple and clear.[4] Where an employer accommodates a non-pregnant employee *similar in his or her ability or inability to work* to a pregnant employee, the employer must likewise accommodate the pregnant employee. This determination does not require any inquiry into the cause or basis for the need for an accommodation.

The court of appeals' contrary reading turns this plain language on its head. Indeed, its approach would effectively vitiate the PDA's protections for pregnant women in the workplace by irrationally narrowing the field of comparators. For example, because the court of appeals focused on the causes of

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[4] The court of appeals stated that reading the PDA's first clause (explicitly stating that discrimination based on pregnancy constituted sex discrimination) and its second clause (mandating equal treatment for pregnant employees) together caused "confusion." *Young*, 707 F.3d at 447. Far from confusing, the two clauses are clear and unambiguous as to what Congress mandated, and work in tandem: the PDA's first clause brings pregnancy-related conditions under the protective aegis of Title VII and the second clause provides the standard of comparison to evaluate claims of discrimination. Indeed, the two-clause statutory structure used in the PDA is not unique in Title VII: the definition of "religion" under Title VII likewise contains a second clause that defines an employer's obligation to make reasonable accommodations for an employee's religious observance. 42 U.S.C. § 2000e(j) (2012).

the employees' limitations in ability or inability to work—*i.e.*, an on-the-job injury, an ADA-qualifying condition, or a DOT decertification—it concluded that the causes accommodated by UPS could not, by definition, be similar to pregnancy. However, the PDA must be read to accommodate pregnant employees within the context of the UPS policy. The PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, 462 U.S. at 684. Following the court of appeals' reasoning to its logical conclusion means that the only appropriate comparators under the PDA are employees with a similar ability or inability to work as pregnant employees *where the ability or inability to work derives from the same cause*, that is, other pregnant employees. It cannot be the case that the PDA only protects pregnant employees to the extent other pregnant employees are accommodated. Such a reading would render the PDA toothless, contrary to its plain language and clear intent that pregnant employees be protected from discrimination.

The court of appeals also wrongly concluded that granting Ms. Young's PDA claim would provide pregnant employees with "a preferential treatment mandate that Congress neither intended nor enacted," because, as the court explained, individuals with the same lifting restriction caused by "picking up his infant child" or working as a "volunteer firefighter would be ineligible for any accommodations." 707 F.3d at 448. The court of appeals' faulty reasoning misses a critical point. While the PDA may not provide pregnant women with "preferential" treatment, it does guarantee pregnant women *equal* treatment. The absence of

such protections for other employees limited in their ability to work for various reasons is *no* basis to ignore the PDA's mandate.

In short, for the PDA's directive that pregnant workers must be treated the same as others "similar in their ability to inability to work" to have any meaning, it must require an employer to provide light duty work to a pregnant woman where the employer so provides for other non-pregnant employees similarly limited in their ability to work. The cause of the employee's limitation simply does not matter for this analysis, which is precisely what the PDA means when it mandates that employees should not be treated differently because they are pregnant.

B. The EEOC's Guidelines Support a Plain Reading of the Statute.

Further reinforcing the plain language reading of the PDA, the EEOC's Guidelines make clear that pregnant employees like Ms. Young should be accommodated where other employees with similar limitations are accommodated regardless of the cause of their limitations. As the agency primarily responsible for ensuring that employers comply with Title VII's mandate, the EEOC speaks with unique authority and deep knowledge on the subject of Title VII.[5] As applicable here, following the enactment of

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[5] The EEOC is charged with enforcing federal laws designed to protect job applicants and employees from discrimination on the basis of race, color, religion, sex, national origin, age, disability or genetic information. *See* United States Equal Employment Opportunity Commission: Overview, *available at* http://www.eeoc.gov/eeoc/ (last visited Sept. 7, 2014).

the PDA in 1978, the EEOC issued "Guidelines on Discrimination Because of Sex" interpreting and explaining an employer's obligation under the PDA (the "EEOC's 1979 Guidelines" or the "1979 Guidelines"). 29 C.F.R. app. Pt. 1604 (1979), Questions and Answers on the Pregnancy Discrimination Act (the "App. to Pt. 1604"). The 1979 Guidelines highlight as the "basic principle of the Act" that "women affected by pregnancy and related conditions must be treated the same as other applicants and employees *on the basis of their ability or inability to work*." *Id.* (emphasis added).

The EEOC's 1979 Guidelines specifically describe an employer's obligation under the PDA to pregnant employees with lifting restrictions like Ms. Young. App. to Pt. 1604, question 5. The Guidelines state that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Id.* The EEOC issued guidance restating this same interpretation in 1983 and again in 2014. *See* EEOC Compliance Manual ("EEOCCM") § 626.4: Right to Work, 2006 WL 4673391 (1983) (the "1983 Guidelines") ("[W]hen a woman employee is unable to perform some of the functions of her job, e.g., heavy lifting, because of pregnancy or a related condition, the employer may not deny her the opportunity to perform modified tasks or alternative assignments or to transfer to another available position if the employer provides such opportunities to employees who are temporarily disabled for other reasons."); EEOC Enforcement Guidance: Pregnancy Discrimination & Related Issues, Notice No. 915.003 (July 14, 2014) (the "2014 Guidelines"). The EEOC's guidance follows the statute's plain text that the

appropriate basis for comparison is not the cause of the restriction (*i.e.*, pregnancy or on-the-job injury), but rather the impact of the cause on the employee's ability to perform her job (*i.e.*, a lifting restriction).

In the 2014 Guidelines, the EEOC restated its position, explicitly affirming that "an employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations." *Id.* The 2014 Guidelines further provide that a pregnant woman can "establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work." *Id.* The EEOC's guidance clarifies that "evidence that a pregnant employee was denied a light duty position provided to other employees" constitutes direct evidence of violation of the PDA.[6] *Id.*

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[6] Because this is direct evidence of a violation of the PDA, it is not necessary for plaintiffs with such evidence to engage in the *McDonnell Douglas* burden-shifting analysis. Nonetheless, if a plaintiff should choose to do so, the 2014 Guidelines make clear that "workers placed in light duty positions because they were injured on the job and/or because they meet the definition of 'disability' under the ADA are appropriate comparators" in establishing discrimination under the *McDonnell Douglas* burden-shifting framework, and proof that another employee similarly situated on the basis of ability or inability to work was treated "differently or more favorably than the pregnant worker" can establish a *prima facie* case of discrimination. *See EEOC Enforcement Guidance: Pregnancy Discrimination & Related Issues*, Notice No. 915.003 (July 14, 2014).

The EEOC's 2014 Guidelines explicitly address the issue on review in this case and confirm that UPS's policy violates the PDA. *See id.* Although the district court and the court of appeals did not have the benefit of the 2014 Guidelines issued in July of this year, they merely reinforce the guidance advanced in 1979 and again in 1983. Each demonstrates the EEOC's full support for a plain text reading of the statute and appropriately guides the analysis of this Court.

C. The History of the PDA's Passage Supports a Plain Reading of the Statute.

The history of the PDA's passage further supports a plain reading of the statute.

Indisputably, Congress passed the PDA in response to *General Electric* v. *Gilbert*, in which this Court held that a company's disability plan that excluded pregnancy did not constitute sex discrimination under Title VII. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-955, 92 Stat. 2076, *as recognized in Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669 (1983). The employer in *Gilbert* had denied compensation to pregnant employees for pregnancy-related absences, but provided compensation for absences of non-pregnant employees as a result of illness or injury. *429 U.S.* at 128-29. In rejecting the pregnant employees' Title VII claim, the Court held that a disability plan covering non-occupational sickness and injury but excluding sickness and injury arising from pregnancy did not violate Title VII because it was "gender neutral." *Id.* at 145-46. The Court also

rejected the claim that a classification concerning pregnancy was necessarily a sex-based classification. *Id.* at 143-44. In the *Gilbert* Court's view, the employer's policy "merely remove[d] one physical condition from the list of compensable disabilities," despite the fact that only one sex, women, could become pregnant. *Id.* (quoting *Geduldig* v. *Aiello*, 417 U.S. 484, 487-89 (1974)).

Congress responded to *Gilbert* by passing the PDA, establishing that the dispositive question in a pregnancy discrimination case is not whether the employer's policy is gender-neutral or pregnancy-blind, but rather, whether pregnant employees are treated equally to non-pregnant employees based on the employees' ability or inability to work. *See* S. Rep. No. 95-331, 95th Cong., 1st Sess. 3-4 (1977) ("Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work."). Under the PDA, the fact that a company policy does not expressly treat pregnant women adversely does not absolve the company of its obligation to extend the same accommodations to pregnant workers as it provides to any non-pregnant employees similarly limited in their ability to work. The court of appeals thus inappropriately relied on UPS's superficially "pregnancy-blind" policies, akin to those at issue in *Gilbert*, in assessing whether Ms. Young was similar in her ability to work as the employees UPS accommodated under those policies. This approach directly contradicts Congress' response to *Gilbert* in passing the PDA.

Policies that cause pregnant women to suffer job loss endanger the economic stability of a substantial number of American families, particularly low-income women and women of color who are disproportionately likely to head households and to work in low-wage jobs that may be physically demanding. *See* Advocacy Letter from Wade Henderson, President and CEO, & Nancy Zirkin, Executive Vice President, The Leadership Conference for Civil and Human Rights, to Member of the House of Representative (Aug. 6, 2014), *available at* http://www.civilrights.org/advocacy/letters/2014/support-pwfa.html. Indeed, the PDA provides critical protections for women and their families to ensure financial security during a woman's pregnancy. In passing the PDA, Congress recognized that "[m]any women disabled by pregnancy and childbirth will be forced to take leave without pay." *Id.* at 3. Noting that women comprised an increasing share of both the U.S. workforce and heads of household in 1978, Congress determined that "the resulting loss of income [would] have a devastating effect on the family unit." *Id.* Today, this potentially devastating impact on pregnant employees is compounded as women make up a significantly larger percentage of the workforce than in 1978. *See* Mitra Toosi, Bureau of Labor Statistics, *Labor Force Projections to 2020: A More Slowly Growing Workforce*, MONTHLY LAB. REV., Jan. 2012, at 43-64.

Like the plaintiffs in *Gilbert*, Ms. Young was forced to take unpaid leave from her job because of a restriction that would have entitled her to a benefit—in this case light duty—under UPS's policy had the restriction been the result of an ADA-

qualifying disability, an on-the-job injury or a DOT decertification, as opposed to pregnancy. *Young*, 707 F.3d at 441. This forced unpaid leave of absence deprived Ms. Young of income, medical insurance, and work experience. *See id.* at 439-41. The PDA was passed to prevent just this type of unequal access to employment benefits.

II. THE COURT OF APPEALS' DECISION IMPROPERLY EXCLUDED ADA-QUALIFYING EMPLOYEES AS APPROPRIATE COMPARATORS FOR A PDA CLAIM.

The court of appeals declined to consider employees accommodated under the ADA as comparators for Ms. Young's PDA claim on the ground that she "is dissimilar to an employee disabled under the ADA for the same reason she herself was not disabled: her lifting limitation was temporary and not a significant restriction on her ability to perform major life activities." 707 F.3d 437 at 450. But the court of appeals' reasoning improperly conflated coverage under the ADA with comparison to the ADA for purposes of a PDA claim. Ms. Young did not claim that her pregnancy was a disability covered by the ADA; rather, she argued—based on the PDA's text—that her employer's refusal to accommodate a pregnant worker on the basis of her inability to work violates the PDA's strict mandate when a non-pregnant ADA-qualifying employee "similar in ability or inability to work" would be accommodated. 42 U.S.C. § 2000e(k). Not only is Ms. Young's position supported by the PDA's plain language, as discussed above, but it is also supported by the ADA's unambiguous purpose—to

pro[illegible] workers with broad workplace protections from discrimination—and other court decisions considering employees accommodated pursuant to the ADA as appropriate comparators in employment discrimination cases. In short, the court of appeals erred by focusing its comparator analysis on a restrictive interpretation of the ADA's applicability, to the exclusion of the PDA's clear mandate, which requires courts simply to compare the accommodations provided pregnant women to those offered to other employees similar in their ability to work.

A. The ADA and ADAAA Were Enacted With the Intent to Broaden Workplace Protections.

The ADA, enacted in 1990, sought to improve protections for individuals with disabilities who had been subject to workplace discrimination. As its preamble states, "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, and independent living, and economic self-sufficiency for such individuals." Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat 327 (1990), (current version at 42 U.S.C. § 12101 (2012)).

Similar to Congress's intent to clarify protections for pregnant women in passing the PDA, Congress passed the ADAAA eighteen years after the ADA's enactment in response to two court decisions that had narrowed the scope of the ADA. In *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999) ("*Sutton*"), the Court limited the breadth of the ADA, deciding that whether or not someone has a "disability" under the ADA turns on whether corrective measures allow

that individual to perform major life activities. In *Toyota Motor Mfg., Kentucky, Inc.* v. *Williams*, the Court further limited the scope of the ADA's protections, ruling that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" and that "the impairment's impact must also be permanent or long term." 534 U.S. 184, 198 (2002). In the "Findings and Purposes" section of the ADAAA, Congress unequivocally responded to both holdings, demonstrating its clear intent that the ADA be interpreted broadly. Pub. L. 110-325, § 2, 122 Stat. 3553 (2008), 42 U.S.C.A. § 12102 (West 2012) (containing uncodified Findings and Purposes of Americans with Disabilities Amendments Act of 2008). Congress specified that one of the purposes of the ADAAA was "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA[.]" 42 U.S.C.A. § 12101 (b)(1) (West 2012). Accordingly, the ADAAA clarified that the definitions of "substantially limits" and "major life activities" were originally intended to have broader application than the Court ascribed to them in *Sutton* and *Toyota*. 42 U.S.C.A § 12101(b)(2), (4) (West 2012).

Although the ADAAA was not yet enacted when Ms. Young's case arose, its passage illustrates how the court of appeals' narrow interpretation of the PDA and exclusion of ADA-qualifying employees as

comparators is particularly problematic.[7] As with the history of the PDA, Congress's response to the Court's narrow reading of the ADA in prior cases was to broaden workplace protections by passing the ADAAA. Though the ADAAA does not apply to this case (*see infra* section II.C.), the fact of its passage should guide this Court away from a narrow application of the ADA that would limit the efficacy of the PDA. As explained above (*see supra* Section I.A.) if all ADA-qualifying employees are excluded as comparators in PDA claims because the cause of the inability to work is dissimilar to pregnancy, PDA claimants would be limited to using only other pregnant women as comparators, which defies the statutory text and could not be what Congress intended. Moreover, the perverse result flowing from the court of appeals' reasoning is amplified by the expansion of the pool of individuals potentially receiving accommodations under the ADAAA going forward. If no person accommodated under the ADA, including the ADAAA, can be a comparator for PDA claims, almost every available comparator would be eliminated, in effect isolating pregnant women from the protections of the PDA.

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[7] Notably, subsequent to its decision in this case, the court of appeals has recognized that the ADAAA was "intended to liberalize the ADA 'in favor of broad coverage,'" holding that a "temporary injury" could constitute a protected disability. *Summers* v. *Altarum Inst., Corp.*, 740 F.3d 325, 330 (4th Cir. 2014) (noting that "[a]lthough short-term impairments qualify as disabilities only if they are 'sufficiently severe'" under EEOC guidelines, a plaintiff with broken legs alleged a "serious impairment" "severe enough to qualify" as disabled).

The Court should read the PDA and the ADA in concert. It can do so by following the PDA's plain language and permitting ADA-qualifying employees as comparators, a result which harmonizes Congress's repeated efforts to broaden the statute's text and workplace protections.

B. Individuals Accommodated Pursuant to the ADA Have Been Used as Comparators in Other Employment Discrimination Contexts.

In contrast to the court of appeals, other courts have relied on persons receiving accommodations pursuant to the ADA as comparators in non-disability related discrimination cases. These cases demonstrate that the proper determination of a comparator in discrimination cases focuses on the needed accommodation, rather than the cause underlying the condition giving rise to that need. *See Fraternal Order of Police Newark Lodge No. 12* v. *City of Newark*, 170 F.3d 359, 365-66 (3d Cir. 1999) (Alito, J.) (hereinafter "*Fraternal Order of Police*"); *Riback* v. *Las Vegas Metro. Police Dep't*, No. 2:07-cv-1152, 2008 WL 3211279 at *4-6 (D. Nev. Aug. 6, 2008) (hereinafter "*Riback*").

In *Fraternal Order of Police*, for example, the court of appeals held that a police department's practice of permitting beards for medical reasons, purportedly adopted to be ADA-compliant, was appropriately taken into account in considering a free exercise claim based on the department's refusal to accommodate employees' request to wear beards in observance of their Muslim faith. 170 F.3d. at 365.

The Newark Police Department had allowed exemptions to its "no beard" policy for medical reasons, but not for officers whose religious beliefs prohibited them from shaving their beards. *Id.* The court of appeals held that the medical exemptions were a valid basis of comparison for the employer's refusal to allow religious-based accommodations. *Id.* The court focused its inquiry on the type of accommodation needed—the ability to have a beard—and not on the similarity or dissimilarity between the religiously observant plaintiffs and persons with disabilities. *See also Riback*, 2008 WL 3211279 at *4-6 (adopting reasoning of *Fraternal Order of Police* to find similar no-beard policy invalid under the free exercise clause and holding that same result would follow under Title VII analysis); *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1119 (10th Cir. 2013) (noting comparisons to ADA-based accommodations in religious discrimination cases).

The court of appeals' analysis in *Young* conflicts with the results and reasoning of these cases. The courts in both *Fraternal Order of Police* and *Riback* focused on the actual accommodation needed—as opposed to the condition from which that practical need arose—to identify comparison groups. In contrast, the court of appeals here focused on the dissimilarities between pregnancy and ADA-qualifying disabilities—the conditions that gave rise to a need for light duty—to exclude employees receiving ADA-based accommodations as comparators and allow only other pregnant women to serve as comparators for a PDA claim.

In so doing, the court of appeals misapprehended the purpose of identifying a comparator under the PDA specifically, and discrimination cases generally. The purpose of a comparator is to "eliminate confounding variables" in order to "isolate the critical independent variable," namely the presence of discrimination. *Humphries* v. *CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir. 2007). The PDA further simplifies the comparator analysis by explicitly identifying the sole criteria for comparison: the pregnant employee's ability or inability to work. By analyzing the similarities between pregnancy and ADA-qualifying disabilities, the court of appeals inappropriately introduced a confounding variable which only served to isolate pregnant workers into a class unto themselves. As demonstrated in *Fraternal Order of Police*, the court of appeals should have focused its inquiry on the specific accommodation that Ms. Young needed as a result of her restricted "ability to work"—rather than the nature of pregnancy itself—to identify employees with similar lifting restrictions receiving ADA-based accommodations as valid comparators under the PDA. Its failure to do so was error, and should be reversed.

C. Persons Receiving ADAAA-Based Accommodations Are Appropriate Comparators for a PDA Claim.

Although the ADAAA had not yet been enacted when Ms. Young's claim arose, the statute reaffirms Congress's original intent in enacting the ADA in 1990. As discussed *supra* Section II.A., the ADAAA restated the ADA's original promise, and "restore[d] the landmark Americans with Disabilities Act to the

civil rights law it was meant to be." 154 Cong. Rec. S9626-01 (daily ed. Sept. 26, 2008) (statement of Sen. Harry Reid, Senate Majority Leader). By clarifying the definition of "disability" and "direct[ing] the courts toward a broader meaning and application of the ADA's definition of disability," the ADAAA codifies a broader understanding of which restrictions are entitled to accommodations under the ADA. *Id.*

The statute's potential impact on PDA cases since its enactment is significant. For plaintiffs bringing claims under the PDA since the ADAAA's passage, the statute provides a clarified and expanded pool of potential comparators. As the EEOC makes clear in its final regulations regarding the implementation of the ADAAA's equal employment provisions, "someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited" under the statute. 29 C.F.R. Pt. 1630, Appendix to Pt. 1630 (2014).

As a result, an employer would be obligated under the ADAAA to accommodate an employee, temporarily restricted from lifting twenty pounds for the duration of the impairment, and any accommodation provided as a result of that restriction could be considered a comparator for a PDA claim like that of Ms. Young, who was also restricted from lifting twenty pounds for a period shorter than six months. Were this Court to affirm the court of appeals' categorical rejection of

employees receiving ADA-based accommodations as comparators based on the permanent and severe nature of the disabilities covered by the ADA at the time Ms. Young brought her claim, such a holding would be limited only to pre-ADAAA cases, as pregnant employees can now rely on the wide range of ADAAA-qualifying disabilities to demonstrate a similar ability to work as any employees receiving accommodations as a result.

III. THIS COURT SHOULD DEFER TO THE EEOC'S GUIDELINES WHEN INTERPRETING THE PDA.

Consistent with the statutory text, the EEOC's PDA Guidelines make clear that the appropriate basis for comparison in a PDA claim is not the cause of the restriction (*i.e.*, pregnancy or on-the-job injury) but rather the impact of the cause on the employee's ability to perform her job (*i.e.*, a lifting restriction). *See* App. to Pt. 1604 (stating "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function."); *see also* EEOCCM § 626.4 (1983); EEOC Enforcement Guidance: Pregnancy Discrimination & Related Issues, Notice No. 915.003 (July 14, 2014). The court of appeals' interpretation of the PDA directly conflicts with the EEOC's long-standing and well-reasoned interpretation of the PDA. *See supra* Section I.B. In reviewing the court of appeals' contrary interpretation, this Court should defer to the statute's plain language and the EEOC's consistent interpretation of the PDA, and reverse. *See Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).

In *Skidmore* v. *Swift & Co*, this Court held that the opinions of an agency with the authority to regulate a particular area of the law are to be given "considerable and in some cases decisive" weight, given the agency's "more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." 323 U.S. at 139-40. This "body of experience and informed judgment" imbues an agency's guidelines and policies with valuable insight, making the guidelines a source "to which courts and litigants may properly resort for guidance." *See id.* at 140. Indeed, *Skidmore* instructs courts "to defer to an agency interpretation of the statute that it administers if the agency has conducted a careful analysis of the statutory issue, if the agency's position has been consistent and reflects agency-wide policy, and if the agency's position constitutes a reasonable conclusion as to the proper construction of the statute, even if [the court] might not have adopted that construction without the benefit of the agency's analysis." *Cathedral Candle Co.* v. *United States ITC*, 400 F.3d 1352, 1366 (Fed. Cir. 2005).

Courts examining Title VII cases in which the EEOC has issued applicable guidance are not to decide *whether* to give deference under *Skidmore*. Rather, the inquiry is *how much* persuasive weight to afford the EEOC's position. In this determination, courts consider various factors, including "the thoroughness evident in [an agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. "The mix of factors, once assayed, either contributes to or

detracts from the power of an agency's interpretation to persuade." *Doe* v. *Leavitt*, 552 F.3d 75, 81 (1st Cir. 2009) (citing *Skidmore*, 323 U.S. at 140).

Accordingly, because the EEOC has unique authority and knowledge on the subject of employment discrimination, this Court has long afforded the EEOC's Title VII guidelines deference under *Skidmore*. *See Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 n.6 (2002) (holding that the EEOC's interpretation contained in its Compliance Manual is due *Skidmore* deference); *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (citing the *Skidmore* standard as the appropriate level of deference for EEOC guidelines and engaging in analysis under *Skidmore*) (overruled on other grounds).

This Court likewise should defer to the EEOC's interpretation of the PDA in this case.[8] Specifically, under the EEOC Guidelines, an appropriate comparator for a pregnant employee with work restrictions need not be similar to the pregnant employee in all respects; rather, the similarity requirement under the PDA is satisfied by drawing a

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[8] Although the lower courts lacked the opportunity to consider the 2014 Guidelines because they were issued in July of this year, the 1979 and 1983 Guidelines provide ample support for a plain text reading and the lower courts should have deferred to the EEOC's interpretation under those Guidelines. To the extent this Court does not reverse the court of appeals' decision and requires further findings regarding the EEOC's most recent interpretation, it should remand this case to the lower court for consideration of the EEOC's 2014 Guidelines.

comparison to an employee similar in his or her "ability or inability to work." *See supra* Section I.B. Because the EEOC's Guidelines are validly reasoned, thoroughly considered and consistent with the EEOC's other interpretations of the PDA, *Skidmore* mandates deference to this interpretation.

A. The EEOC's PDA Guidelines Are Validly Reasoned.

A validly reasoned agency interpretation is afforded significant weight under *Skidmore*. *See* 323 U.S. at 140. Interpretations that are consistent with the statute and legislative intent are afforded significant deference. *See Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011) ("These agency views are reasonable. They are consistent with the Act.") (holding that the EEOC's interpretation of a statute "add[ed] force to [the Court's] conclusion" because it was reasonable); *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 401-02 (2008) (holding that deference to an EEOC interpretation regarding the type of filing that constituted a "charge" under the Age Discrimination in Employment Act of 1967 was appropriate under *Skidmore* in part because it was consistent with "Congress' expressed desire that the EEOC act as an information provider and try to settle employment disputes through informal means.").

As noted in section I.B., the EEOC's statements interpreting the PDA are consistent with the statute's plain language. By merely requiring as a comparator a non-pregnant employee with similar work restrictions (and *not* a non-pregnant employee whose restriction is caused by a similar *condition*), the EEOC Guidelines give force to the PDA's plain

language requirement that pregnant employees are accommodated in the *same* manner as non-pregnant employees similar in their "ability or inability to work." *See supra* Section I.B.[9]

The EEOC's interpretation also is consistent with this Court's prior interpretation of the PDA. *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987) ("Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.") (internal citations omitted); *see also Ensley-Gaines*, 100 F.3d at 1226 ("While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated 'in all respects,' the PDA requires only that the employee be similarly situated in his or her '*ability or inability to work*.'")(emphasis added).

Because the EEOC's interpretation of the PDA is consistently *supported* by the plain language of the Act, the Congressional intent behind the PDA, and this Court's interpretation and understanding of the Act, there can be no doubt that the EEOC Guidelines are validly reasoned.

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[9] This interpretation also is supported by the legislative history of the PDA, which states that "the treatment of pregnant *women* in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work." S. Rep. No. 95-331 at 4; *see supra* Section I.A.

B. The EEOC's PDA Guidelines Are Consistent With Earlier and Later Agency Pronouncements.

An agency's consistency in its interpretation of a statute entitles it to significant deference. *See Skidmore*, 323 U.S. at 140; *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (U.S. 2001) (courts consider the "consistency" of an agency's position in evaluating its persuasiveness); *Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due."). The EEOC has maintained its PDA guidelines for thirty-five years. *See* App. to Pt. 1604. Utilizing these guidelines, the EEOC has also maintained a consistent position in litigation for decades. *See EEOC* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000) (EEOC arguing that an employer violated the PDA by providing accommodations to employees injured in the work place and employees with temporary injuries or illnesses incurred outside the workplace but not to pregnant woman).

Moreover, the 1979 Guidelines are consistent with the EEOC's statements issued in the decades after the PDA took effect. The EEOC interpreted the PDA in the same manner in its 1983 Compliance Manual. *See* EEOCCM § 626.4 (1983) ("[W]hen a woman employee is unable to perform some of the function of her job, e.g., heavy lifting, because of pregnancy or a related condition, the employer may not deny her the opportunity to perform modified tasks or alternative assignments or to transfer to another available position if the employer provides

such opportunities to employees who are temporarily disabled for other reasons."). And most recently, the EEOC's 2014 PDA guidelines maintain the EEOC's position that the appropriate comparator for a pregnant woman is an accommodated employee similar *in his or her ability to work.* EEOC Enforcement Guidance: Pregnancy Discrimination & Related Issues, Notice No. 915.003 (July 14, 2014) ("2014 Guidelines").

The 2014 Guidelines were issued following a February 2012 hearing at which the Commission heard from "a number of witnesses regarding the need for updated guidance to make such protections clear to both employees and employers." Chai R. Feldblum, *Statement of Comm'r Chai R. Feldblum on Approval of the Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014). Like the 1979 guidelines, the 2014 Guidelines make clear that a comparison on the basis of ability or inability to work in the context of a lifting restriction requires a comparison not of the *reason* for the lifting restriction but rather the lifting restriction *itself*. *See* 2014 Guidelines at 8. ("[S]omeone who, because of a back impairment, has a 20-pound lifting restriction that lasts for several months would be an appropriate comparator for PDA purposes to a woman who has a similar restriction due to pregnancy."); *see also id.* at 12 ("an employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation"). Not only are the 2014 Guidelines consistent with the earlier 1979 and 1983 Guidelines, Commissioner Chai R. Feldblum has stated that they also are consistent with the EEOC's position in the Commission's other employment discrimination

guidance materials. *Statement of Comm'r Chai R. Feldblum* at 2.

Because the EEOC has maintained remarkable consistency in its guidelines from the enactment of the PDA until today, this Court should regard the EEOC's Guidelines as highly persuasive authority. For this additional reason, this Court should reverse the decision of the court of appeals.

* * *

The PDA was enacted to provide pregnant women with protection against workplace discrimination by mandating that pregnancy discrimination is a type of sex discrimination under Title VII and by providing employers and courts with a pool of appropriate comparators to evaluate such claims. That pool is employees similar in their ability to work. The plain language of the PDA makes clear that the relevant inquiry in a PDA claim relates to the employees' work restrictions, not the causes of those restrictions. This interpretation is further supported by the unwavering guidance of the EEOC, the federal agency primarily responsible for the enforcement of Title VII.

In categorically excluding three groups of comparators on the ground that Ms. Young's restriction did not arise in the same manner as those restrictions accommodated by her employer, the court of appeals effectively gutted the PDA by limiting the pool of comparators for a PDA claim to only other pregnant women. Such a reading is contrary to the plain language and purpose of the PDA to provide protection to pregnant women in the workplace. This Court should reverse.

CONCLUSION

For all of the above reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Maria T. Vullo
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3346
mvullo@paulweiss.com

Wade J. Henderson
Lisa M. Bornstein
The Leadership Conference on Civil and Human Rights
1629 K Street, NW, 10th Fl.
Washington, DC 20006
(202) 466-3311
bornstein@civilrights.org

Of Counsel:
Ralia E. Polechronis
Elana Rose Beale
Erin Smith Dennis
Charles J. Hamilton (not yet admitted)
Erin J. Morgan
September 11, 2014

Appendix

Coalition Members of The Leadership Conference on Civil and Human Rights

9to5, National Association of Working Women
A. Philip Randolph Institute (APRI)
AARP
AAUW (formerly known as the American Association of University Women)
Advancement Project
African Methodist Episcopal Church (AME Church)
Alaska Federation of Natives (AFN)
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American-Arab Anti-Discrimination Committee (ADC)
American Association for Access, Equity and Diversity (AAAED)
American Association of Colleges for Teacher Education
American Association of People with Disabilities (AAPD)
American Baptist Home Mission Societies, American Baptist Churches USA
American Civil Liberties Union (ACLU)
American Council of the Blind (ACB)
American Ethical Union (AEU)
American Federation of Government Employees, AFL-CIO (AFGE)
American Federation of Labor and Industrial Organizations (AFL-CIO)

American Federation of State, County & Municipal Employees, AFL-CIO (AFSCME)
American Federation of Teachers, AFL-CIO (AFT)
American Friends Service Committee (AFSC)
American Islamic Congress (AIC)
American Jewish Committee (AJC)
American Nurses Association (ANA)
American Postal Workers Union, AFL-CIO (APWU)
American Society for Public Administration (ASPA)
American Speech-Language-Hearing Association (ASHA)
Americans for Democratic Action (ADA)
Americans United for Separation of Church and State
Amnesty International USA
The Andrew Goodman Foundation
Anti-Defamation League (ADL)
Appleseed
The Arc
Asian Americans Advancing Justice | AAJC
Asian Pacific American Labor Alliance, AFL-CIO (APALA)
Association for Education and Rehabilitation of the Blind and Visually Impaired. (AER)
The Association of Junior Leagues International Inc. (AJLI)
The Association of University Centers on Disabilities (AUCD)
Bend the Arc
B'nai B'rith International (BBI)
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFL-CIO (BCTD)

Center for Community Change (CCC)
Center for Responsible Lending (CRL)
Center for Social Inclusion
Center for Women Policy Studies
Children's Defense Fund (CDF)
Church of the Brethren - World Ministries Commission
Church Women United (CWU)
Coalition of Black Trade Unionists (CBTU)
Coalition on Human Needs
Common Cause
Communications Workers of America, AFL-CIO, CLC (CWA)
Community Action Partnership
Community Transportation Association of America (CTAA)
Compassion & Choices
DC Vote
Delta Sigma Theta Sorority, Inc.
DEMOS: A Network for Ideas & Action
Disability Rights Education and Defense Fund (DREDF)
Disability Rights Legal Center
Division of Homeland Ministries Christian Church (Disciples of Christ)
Epilepsy Foundation of America
Episcopal Church - Public Affairs Office
Equal Justice Society
Evangelical Lutheran Church in America (ELCA)
FairVote
Families USA
Federally Employed Women (FEW)
Feminist Majority
Friends Committee on National Legislation (FCNL)

Gay, Lesbian and Straight Education Network (GLSEN)
Global Rights
Glass, Molders, Pottery, Plastics & Allied Workers International Union (GMP)
Hip Hop Caucus
Human Rights Campaign (HRC)
Human Rights First (HRF)
Immigration Equality
Improved Benevolent and Protective Order of Elks of the World
International Association of Machinists and Aerospace Workers (IAM)
International Association of Official Human Rights Agencies (IAOHRA)
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League (JACL)
Jewish Council for Public Affairs (JCPA)
Jewish Labor Committee (JLC)
Jewish Women International (JWI)
Judge David L. Bazelon Center for Mental Health Law (Bazelon Center)
Kappa Alpha Psi Fraternity, Inc.
Labor Council for Latin American Advancement (LCLAA)
Laborers' International Union of North America (LIUNA)
Lambda Legal
LatinoJustice PRLDEF
Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens (LULAC)
League of Women Voters of The United States (LWV)
Legal Aid Society – Employment Law Center (LAS-ELC)
Legal Momentum
Mashantucket Pequot Tribal Nation
Matthew Shepard Foundation
Mexican American Legal Defense and Educational Fund (MALDEF)
Muslim Advocates
NA'AMAT USA
NAACP Legal Defense and Educational Fund, Inc. (LDF)
NALEO Educational Fund
National Alliance of Postal & Federal Employees (NAPFE)
National Association for Equal Opportunity in Higher Education (NAFEO)
National Association for the Advancement of Colored People (NAACP)
The National Association of Colored Women's Clubs, Inc. (NACWC)
National Association of Community Health Centers (NACHC)
National Association of Consumer Advocates (NACA)
National Association of Human Rights Workers (NAHRW)
National Association of Latino Elected and Appointed Officials (NALEO)
National Association of Negro Business & Professional Women's Clubs, Inc. (NANBPWC)
National Association of Neighborhoods (NAN)
National Association of Social Workers (NASW)
National Bar Association (NBA)

National Black Caucus of State Legislators (NBCSL)
National Black Justice Coalition (NBJC)
National Center for Lesbian Rights
National Center for Transgender Equality (NCTE)
The National Center on Time & Learning
National Coalition for Asian Pacific American Community Development (National CAPACD)
National Coalition for the Homeless (NCH)
National Coalition on Black Civic Participation (NCBCP)
National Coalition to Abolish the Death Penalty (NCADP)
National Committee on Pay Equity (NCPE)
National Committee to Preserve Social Security & Medicare
National Community Reinvestment Coalition (NCRC)
The National Conference for Community and Justice
National Conference of Black Mayors, Inc. (NCBM)
National Congress for Puerto Rican Rights (NCPRR)
National Congress of American Indians (NCAI)
National Consumer Law Center (NCLC)
National Council of Churches of Christ in the U.S.(NCC)
National Council of Jewish Women (NCJW)
National Council of La Raza (NCLR)
National Council of Negro Women (NCNW)
National Council on Independent Living (NCIL)
National Disability Rights Network (NDRN)
National Education Association (NEA)
National Employment Lawyers Association (NELA)
National Fair Housing Alliance (NFHA)
National Farmers Union (NFU)

National Federation of Filipino American Associations (NaFFAA)
National Gay and Lesbian Task Force
National Health Law Program (NHeLP)
National Hispanic Media Coalition (NHMC)
National Immigration Forum
National Immigration Law Center (NILC)
National Korean American Service and Education Consortium (NAKASEC)
National Latina Institute for Reproductive Health
National Lawyers Guild (NLG)
National Legal Aid & Defender Association (NLADA)
National Low Income Housing Coalition (NLIHC)
National Organization for Women (NOW)
National Partnership for Women & Families
National Parent Teacher Association (PTA)
National Senior Citizens Law Center
National Sorority of Phi Delta Kappa, Inc.
National Urban League (NUL)
National Women's Law Center (NWLC)
National Women's Political Caucus (NWPC)
Native American Rights Fund (NARF)
Newspaper Guild
OCA (formerly known as Organization of Chinese Americans)
ORT America
Office of Communication of the United Church of Christ, Inc. (OC Inc.)
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center (OSPC)
Outserve-SLDN
Paralyzed Veterans of America (PVA)
Parents, Families and Friends of Lesbians and Gays (PFLAG)

People For the American Way (PFAW)
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc. (PPFA)
PolicyLink
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (U.S.A.)
Pride At Work
Prison Policy Initiative
Progressive National Baptist Convention (PNBC)
Project Vote
Public Advocates Inc.
Religious Action Center of Reform Judaism (RAC)
Retail, Wholesale and Department Store Union (RWDSU)
Secular Coalition for America
Service Employees International Union (SEIU)
The Sierra Club
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Coalition
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference (SCLC)
Southern Poverty Law Center (SPLC)
TASH
Teach for America
TransAfrica Forum
Transportation Learning Center
Union for Reform Judaism (URJ)
Unitarian Universalist Association (UUA)
UNITE HERE!

United Brotherhood of Carpenters and Joiners of America (UBC)
United Church of Christ Justice and Witness Ministries (JWM)
United Farm Workers of America, AFL-CIO (UFW)
United Food and Commercial Workers International Union (UFCW)
United Methodist Church-General Board of Church & Society
United Mine Workers of America, AFL-CIO (UMWA)
United States International Council on Disabilities (USICD)
United States Students Association (USSA)
United Steelworkers of America (USW)
United Synagogue of Conservative Judaism (USCJ)
The Voter Participation Center
Wider Opportunities for Women
Workers Defense League
Workmen's Circle
YMCA USA
YWCA USA
Zeta Phi Beta Sorority, Inc.

AMICUS CURIAE BRIEF

No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG

Petitioner,

v.

UNITED PARCEL SERVICE, INC.

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Emily Martin
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
(202) 319-3049

Andrew H. Bart
Counsel of Record
Anne Cortina Perry
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600
abart@jenner.com

Counsel for *Amici Curiae*

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INTEREST OF AMICI CURIAE[1]

The undersigned *amici* are Members of the U.S. House of Representatives and U.S. Senate, some of whom were members of the 95th Congress, which passed the Pregnancy Discrimination Act ("PDA"),[2] and all of whom share an interest in ensuring that the PDA is accurately interpreted and applied, consistent with its text and Congressional intent. *Amici* urge the reversal of the Fourth Circuit decision below, which they believe misinterprets the PDA and this Court's precedent, and in so doing improperly narrows the protections they or their predecessors intended to guarantee to pregnant workers. Some *amici* are also co-sponsors of a pending bill, the Pregnant Workers Fairness Act ("PWFA"),[3] who wish to present to the Court their intention in proposing the PWFA and the relationship between current law and the PWFA.

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[1] Pursuant to Rule 37.2(a), the parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A complete list of *amici* is provided at Appendix A of this brief. The *amici* who were members of the 95th Congress are Sen. Barbara A. Mikulski, Sen. Edward J. Markey, Sen. Tom Harkin, Sen. Patrick Leahy, Rep. John Conyers, Jr., Rep. Henry A. Waxman, Rep. Richard M. Nolan and Rep. Charles B. Rangel.

[3] *Amici* who are co-sponsors of the PWFA are indicated in Appendix A by an asterisk next to their names.

SUMMARY OF ARGUMENT

Congress passed the Pregnancy Discrimination Act ("PDA") in direct response to this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), which held that Title VII, as then drafted, did not prohibit an employer from excluding women with disabilities arising from pregnancy and childbirth from a disability plan covering sickness and injury, unless the plaintiff could show the distinction based on pregnancy was a pretext to discriminate on the basis of sex. Because Congress believed that this interpretation of Title VII was erroneous and contrary to the intention of the drafters, it enacted the PDA, expressly providing that the terms "because of sex" or "on the basis of sex" found in Title VII include "because of or on the basis of pregnancy, childbirth, and related medical conditions." 42 U.S.C. § 2000e(k). In doing so, Congress ensured that distinctions based on pregnancy and related conditions would be considered discrimination on the basis of sex under Title VII.

However, the PDA did more than this. In passing the PDA, Congress also developed and enacted the controlling standard employers must use in determining whether a pregnant worker is to be provided a benefit afforded another worker. Specifically, employers are only to consider whether the pregnant worker's "ability or inability to work," is similar to that of the worker receiving the benefit.

Id. If so, the pregnant worker must receive the same "treat[ment]." *Id.*

In the decision below, the Fourth Circuit ignored this explicit statutory mandate by holding that Peggy Young, a UPS driver who requested light duty because of limitations arising from her pregnancy, was not entitled to that accommodation, despite the fact that workers who had other disabilities, injuries, and physical conditions that similarly affected their ability to work received light duty. The Court justified its decision by placing dispositive emphasis on the source or legal categorization of an employee's inability to work in assessing entitlement to benefits (e.g., whether the inability resulted from an on-the-job injury, a disability under the ADA, or the loss of a commercial driver's license). To reach this result, the Fourth Circuit ignored the unambiguous mandate of the PDA requiring employers to consider only the ability or inability to work in determining a pregnant worker's entitlement to benefits, and considered additional factors not permitted by the PDA. In so doing, it judicially erased the protection Congress intended to provide by enacting the "ability or inability to work" standard. Once employers are permitted to narrow the class of potential comparators by considering the source or legal categorization of the inability to work, they will be able to justify denying pregnant workers benefits available to others.

The legislative history of the PDA clearly reflects Congress's intention to protect pregnant

workers by defining the sole factor employers may use to distinguish between pregnant workers and others in deciding whether to extend benefits in employment: the ability or inability to work.

Congress not only overturned the holding of *Gilbert,* it rejected the attitude toward pregnant women reflected in the decision. It recognized that hostility toward pregnant workers was a primary driver of sex discrimination in the workplace, and that, in order to ensure that pregnant women were no longer treated as second-class citizens on the job, employers must treat them as well as they treated other workers whose ability to do their job was affected by injury, disability, or disease. The concerns of the PDA's drafters regarding the discrimination experienced by pregnant workers and mothers based on stereotypes about the incompatibility of motherhood and work unfortunately remain compelling today.

As drafters and co-sponsors of the Pregnant Workers Fairness Act ("PWFA"), which seeks to reaffirm the PDA's strong protections against this discrimination, *amici* believe the PDA must be interpreted as it was drafted, and as it was intended to be applied. Further, *amici* submit this brief to make clear that nothing in the PWFA or the fact it has been proposed implies that the Fourth Circuit decision is anything other than an inappropriate judicial rewriting of unambiguous statutory language. *Amici* urge the Court to respect the language adopted by Congress in the PDA and overturn the Fourth Circuit's decision below.

ARGUMENT

I. The Plain Language of the PDA Contains Two Distinct Provisions—Each of Which Must Be Given Meaning.

In affirming the grant of summary judgment to UPS, the Fourth Circuit offered no alternative interpretation of the meaning of the dispositive statutory language requiring employers to treat pregnant workers the same as other employees "similar in their ability or inability to work." Indeed, the Court expressly acknowledged that "[s]tanding alone," this language is "unambiguous." Pet. App. 20a. Yet, the Fourth Circuit concluded that based on its "placement in the definitional section of Title VII, and grounded within the confines of sex discrimination under sec. 703," this provision did not meaningfully alter the analysis to be applied in pregnancy discrimination claims. *Id.* at 20a-21a. Based on these considerations rather than the concededly unambiguous statutory language itself, the Court mistakenly concluded that employers can deny pregnant workers employment-related benefits available to other employees similar in their ability to work. *Id.* As such, the decision ignores basic tenets of statutory construction, constitutes legal error, and must be set aside.

A. Congress Adopted the PDA to Override the Supreme Court's Misreading of Title VII in *General Electric Co. v. Gilbert.*

In 1964, Congress passed the Civil Rights Act, which prohibited, among other things, discrimination in employment "because of" or "on the basis of" an employee's sex. In *Gilbert*, this Court held that Title VII's prohibition of discrimination on the basis of sex did not prevent an employer from excluding women with disabilities arising out of pregnancy or childbirth from access to benefits available to workers with disabilities arising out of sickness or accidents, absent a showing that "'distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.'" 429 U.S. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)); *id.* at 145-46.

This decision, permitting employers to discriminate in the benefits or terms of employment afforded pregnant workers, was premised on the Court's belief that such discrimination did not violate Title VII because it was based on the unprotected condition of pregnancy, rather than on the protected category of "sex." In so holding, this Court endorsed the view that workers disabled by pregnancy could be treated differently—indeed, worse—than workers disabled by sickness or injury, unless the pregnant worker could demonstrate that the difference in treatment was motivated by a general animus toward women.

This Court's reasoning was premised on its perception that pregnancy was not "comparable in all other respects to covered diseases or disabilities" because "it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition." *Id.* at 136. The Court's explicit conclusion that pregnancy is not directly comparable to other conditions, and the attitude animating that conclusion, led Congress to adopt the "ability or inability to work" standard that is set out in the second clause of the PDA. This standard determines what constitutes discrimination on the basis of pregnancy. *See, e.g., Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987) ("[T]he second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.").

B. The Plain Language of the PDA Reflects Congress's Intent to Reject the Result and Reasoning in *Gilbert*.

Under long established precedent, the first step in determining the meaning of relevant statutory language is to carefully review the plain language of the statute itself. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others [:] a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). This doctrine is grounded in the concept of comity among the three "coequal" branches of government: "[w]here the language of a statute is

clear in its application, the normal rule is that we are bound by it." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). This rule "demonstrates a respect for the coequal Legislative Branch. " *Id.*

The starting point for evaluating the meaning of the PDA is to consider the applicable language in its entirety. The first sentence of the PDA is comprised of two main clauses[4]:

> [Clause 1:] The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; [Clause 2:] **and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise.**

42 U.S.C. § 2000e(k) (amending Section 701 of the Civil Rights Act of 1964) (emphasis added).

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[4] The second sentence addresses employer funding for abortion benefits, and is not relevant to the statutory analysis provided here.

1. Congress's first manifest purpose in passing the PDA was to confirm that pregnancy and related conditions were included within the terms "because of sex" and "on the basis of sex."

The first clause of the PDA clarifies that Title VII's prohibitions on discrimination "because of sex" or on the "basis of sex" apply to discrimination "because of" or "on the basis of" pregnancy, childbirth, and related medical conditions. Accordingly, women are entitled to protection from pregnancy-based "classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status." *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) (citing Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a)). The first clause directly overruled the holding in *Gilbert* that discrimination on the basis of pregnancy is not discrimination on the basis of "sex" in part because pregnancy is a condition affecting some, but not all, women. 429 U.S. at 135, 145-46. This clause of the PDA affirmed prior Equal Employment Opportunity Commission ("EEOC") guidance stating that sex discrimination included pregnancy discrimination. *See Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the S. Comm. on Human Res.*, 95th Cong. 26 (1977) (statement of Sen. Kennedy) ("The Court's opinion [in *Gilbert*]

disregarded the 1972 Equal Employment Opportunity Commission guidelines that required pregnancy-related disabilities be treated the same as any other temporary disability in the allocation of disability and sick leave benefits.").

2. Congress's second manifest purpose in passing the PDA was to establish the obligation of employers to treat pregnant workers like "other persons" similar in their "ability or inability to work"

The second clause of the PDA expressly sets the legal standard to be applied to ensure fair treatment for pregnant women in the workplace. Employers are to treat pregnant workers, for all employment purposes, as "other persons similar in their ability or inability to work."[5] 42 U.S.C. § 2000e(k). This unambiguous statutory language requires that when employers determine whether a pregnant worker is entitled to a given benefit or type of treatment, they are to consider only one factor: whether "other persons" in the workplace of "similar

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[5] This requirement established the minimum benefits to which a pregnant worker is entitled. "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop-not a ceiling above which they may not rise.'" *Guerra*, 479 U.S. at 285 (quoting *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985), *aff'd*, 479 U.S. 272 (1987)).

ability or inability to work" are given the requested benefit or type of treatment. *Id.*

This portion of the PDA was also a direct response to *Gilbert*, which rested on a perception that pregnancy was not directly comparable to the covered diseases and disabilities. The fact that pregnancy is, in some ways, a unique condition (as this Court observed in *Gilbert*) means that employers and courts will often be able to find means to distinguish this condition from other physical conditions such as injury or disease.

To ensure that employers and courts would not deny benefits to pregnant workers by distinguishing the condition of pregnancy from covered disabilities, Congress provided employers with a simple, clear, single-factor standard to measure employers' treatment of pregnant workers. Under that standard, only the ability to work is relevant—not the source of any limitation in that ability, the legal categorization of a disability, or the employer's intent in treating pregnancy differently from other potentially disabling conditions.

This reading of the clear, unambiguous language of the statute has been repeatedly confirmed by this Court. In *Johnson Controls*, this Court recognized that the standard set forth in the second clause provides that "[u]nless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" 499 U.S. at 204 (quoting 42 U.S.C. §

2000e(k)). With the PDA, "Congress indicated that the employer may take into account only the woman's ability to get her job done." *Id.* at 205-06. This echoes the Court's interpretation of the PDA in *Newport News*, 462 U.S. at 684 & n.24 ("The 1978 Act [PDA] makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.").

3. The placement of the entirety of the PDA within a section titled "Definitions" does not minimize or alter the import of the plain language of the second clause.

Because the first clause of the PDA clarified the definition of "because of sex" for the purposes of Title VII, the entire PDA was placed in the "Definitions" section of Title VII. The Fourth Circuit's decision below erroneously put dispositive emphasis on the placement of the PDA rather than on the meaning of the language itself, and used that statutory placement as its justification for judicially erasing the second clause from the statute. Pet. App. 20a. However, the placement of the PDA in the definitional section of Title VII does not diminish the substantive impact of the second clause.

As a matter of statutory construction, a heading or title of a section "cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S.

241, 256 (2004) (quoting *Trainmen*); *see also Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Trainmen*). Thus, the section's title, "Definitions," cannot annul or modify the clear congressional mandate unambiguously expressed in the second clause of the PDA.

Indeed, this is not the only instance where Congress placed a comprehensive treatment of a substantive right within the Definitions section of Title VII. When Congress amended Title VII to explicitly require employers to accommodate religious exercise, it placed the entire provision within the very same Definitions section of Title VII, at 42 U.S.C. § 2000e(j). This Court has recognized that the religious accommodation requirement imposes substantive obligations, which supplement the nondiscrimination rules applicable to other classes protected under Title VII: it mandated that "an employer, short of 'undue hardship,' [must] make 'reasonable accommodations' to the religious needs of its employees." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977) (interpreting the EEOC regulation and recognizing that Congress had since amended the statute to include this language). The religious accommodation provision thus added substantive content, not applicable to the rest of Title VII, uniquely focused on the rights of religious practitioners. Similarly, the PDA's second clause contains substantive content, not applicable to the rest of Title VII, uniquely focused on the rights of pregnant workers.

Neither this Court nor any other court considering the religious accommodation provision in the forty-two years since its enactment has suggested that the location of the provision in the "Definitions" section and its inclusion of a definition of "religion" somehow annulled or modified the substantive meaning reflected in the plain language of the requirement. Rather, courts have specifically noted that the religious accommodation amendment contains a broad definition of religion, an implied substantive duty to accommodate employees' religions, and "an explicit affirmative defense for failure-to-accommodate claims if the accommodation would impose an undue hardship on the employer." *Adeyeye v. Heartland Sweetners, LLC*, 721 F.3d 444, 448 (7th Cir. 2013); *see also Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 63 n.1 (1986) ("The reasonable accommodation duty was incorporated into the statute, somewhat awkwardly, in the definition of religion.").[6]

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[6] *See also Tagore v. United States*, 735 F.3d 324, 329 (5th Cir. 2013) ("Title VII prohibits an employer from discriminating against an employee on the basis of her religion, unless the employer is unable to reasonably accommodate the employee's religious exercise without undue hardship to its business. 42 U.S.C. §§ 2000e–2(a)(1), 2000e(j)."); *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011); *Webb v. City of Phila.*, 562 F.3d 256, 259-60 (3d Cir. 2009); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *Tepper v. Potter*, 505 F.3d 508, 514 (6th Cir. 2007); *Baker v. Home Depot*, 445 F.3d 541, 546 (2d Cir. 2006); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 602-03 (9th Cir. 2004).

Not long after the religious accommodation provision was codified in the Definitions section of Title VII and interpreted by this Court to set out a distinct substantive standard in addition to a definitional component, Congress similarly placed the entire PDA within the Definitions section of Title VII. The PDA, too, provides a definitional revision as well as a substantive duty (to afford pregnant workers treatment or benefits provided to workers similar in their ability to work).

That the PDA creates substantive duties and affects substantive rights and defenses is further illustrated by the final clause in the second sentence, which states that "nothing in section 2000e-2(h) of this title [section 703(h)] shall be interpreted to permit otherwise." 42 U.S.C. § 2000e(k). Through this language, Congress expressly overrode, as to pregnant workers, a provision of Title VII aligning defenses in cases alleging sex-based discrimination in wages with those available in an Equal Pay Act claim. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 709 n.3 (2009) ("Congress wanted to ensure that . . . it foreclosed the possibility that this Court's interpretation of the Bennett Amendment [the final sentence of section 703(h)] could be construed, going forward, to permit wage discrimination based on pregnancy."). The impact of this substantive amendment to Title VII is not lessened by its location in the Definitions section.

C. The Fourth Circuit's Decision Rewrote the Standard Mandated by the PDA and Rendered the Second Clause Superfluous, in Violation of This Court's Precedent and the Canons of Statutory Construction.

Despite the plain command of the second clause of the PDA, the Fourth Circuit adopted a reading of the statute that would permit employers to deny pregnant workers workplace benefits that are offered to other workers who are similar in their ability or inability to work. Specifically, the Fourth Circuit permitted UPS to treat Ms. Young less favorably than workers who were receiving light duty based on a similar ability or inability to work, so long as the comparators could be distinguished from Ms. Young on some "pregnancy blind" basis not shown to be motivated by animus against pregnant women. Pet. App. 27a-28a. However, in doing so, the Fourth Circuit judicially re-drafted the PDA to add limitations contrary to the language and underlying purpose of the statute's text. *See id.* 27a-29a.

1. The Fourth Circuit improperly modified the directive of the PDA that employers treat pregnant workers the same as other persons similar in their ability or inability to work.

The PDA's second clause embodies a clear directive: "women affected by pregnancy, childbirth,

or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Thus, the "ability or inability to work" is the sole basis of comparison permitted by Congress. There are no exceptions or limitations to this mandate. Employers are not free to make determinations based on other unlisted factors. If an employer provides a non-pregnant worker a particular benefit or term of employment based on the non-pregnant worker's ability or inability to work, the PDA requires that the pregnant worker with a similar ability or inability to work "shall be treated the same" without distinctions based on the nature of the workers' conditions. *Id.*; *see also Johnson Controls*, 499 U.S. at 204 ("Unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" (quoting 42 U.S.C. § 2000e(k)).

The interpretation adopted by the Fourth Circuit, however, perverted the meaning of the second clause of the PDA to focus not on the ability to work, but on the cause or legal categorization of any limitation in ability to work. Pet. App. 27a. By allowing an employer to provide or withhold benefits based on factors other than the ability to work, the Fourth Circuit improperly inserted new language into the statute. *Id.* at 27a-28a.

A court's ability to modify clear statutory language is strictly circumscribed. Courts are "not

free to rewrite the statute that Congress has enacted." *Dodd v. United States*, 545 U.S. 353, 359 (2005); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous. [w]e will not alter the text."). The sole exceptions to this canon of statutory construction requiring adherence to a statute's plain language occur when application of statutory language would result in patently absurd results or is not parallel to obvious Congressional intent. *See Public Citizen*, 491 U.S. at 454 ("Where the literal reading of a statutory term would compel 'an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." (internal citation omitted)); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (in "exceptional cases," court will not permit a statutory interpretation "demonstrably at odds with the intentions of its drafters "). The PDA's clear command that a pregnant worker be treated the same as others "similar in ability or inability to work" is a logical and consistent response to the holding in *Gilbert* and a reaffirmation of the guiding principles of Title VII.[7] Indeed, the Fourth Circuit

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[7] Indeed, the suggestion that a standard that has the effect of requiring accommodations for pregnant workers would be absurd flies in the face of the reality that many states have adopted explicit legal requirements of reasonable accommodations for those pregnant workers who need them. *See* Cal. Gov't Code § 12945 (West 2012); S.B. 212, 147th Gen. Assem., Reg. Sess. (Del. 2014); Haw. Code R. § 12-46-107 (1990); 2014 Ill. Legis. Serv. Pub. Act 98-1050 (West) (effective Jan. 1, 2015); Md. Code Ann., State Gov't § 20–609 (West 2013); Minn. Stat. Ann. § 181.9414 (West 2014); N.J. Stat.

never suggested that its rewriting of the statute was based on its conclusion that, without such a judicial amendment, absurd results would ensue. Since the Fourth Circuit's decision breached the foundational canon requiring fidelity to the unambiguous language of a non-absurd statute, the result below should be reversed.

2. The Fourth Circuit's interpretation, which "reconciled" the two clauses by limiting the protections of the PDA to those established in the first clause only, renders the second clause superfluous.

In perhaps the most telling language of its opinion, the Fourth Circuit conceded that, "[s]tanding alone, the second clause's plain language is unambiguous." Pet. App. 20a. That candid admission should end the inquiry. *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 662-63 (1876) ("[W]here the language of the act is unambiguous and explicit, courts are bound to seek for the intention of the legislature in the words of the act itself, and they are not at liberty to suppose that the legislature intended any thing different from what their language imports."). Instead, the court below attempted to "reconcile" the first and second clause. Pet. App. 20a-21a. Yet, there is no inconsistency between the two clauses

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Ann. § 10:5-12(s) (West 2014); W. Va. Code Ann. § 5-11B-2 (West 2014).

requiring reconciliation. The first clause clarifies that the terms "because of sex" or "on the basis of sex" include pregnancy, childbirth, and related conditions and does so unambiguously. The second clause serves a wholly different purpose: it sets forth a clear, one-factor standard to be applied in evaluating whether pregnant women must receive the same treatment as other workers.

By allowing employers to consider non-statutory factors in deciding the issue, the Court re-wrote the statute in a way that permits results directly prohibited by the unambiguous language of the statute. Under the Fourth Circuit holding, *any* standard adopted by an employer that does not expressly exclude pregnancy in determining when to accommodate limitations in ability to work is permissible, even if that standard has the actual effect of excluding all pregnant workers from benefits available to other workers who have similar physical limitations. In so holding, the Fourth Circuit judicially re-drafted the PDA and stripped its protections down to those provided by the first clause prohibiting discrimination because of pregnancy. The Fourth Circuit's circular reasoning that "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury," conclusively demonstrates that the Court's interpretation renders the second clause meaningless. Pet. App. 28a. As the universe of comparators shrinks, pregnant

workers' rights (contingent as they are upon treatment afforded their comparators) do as well.[8]

By introducing factors other than the ability or inability to work, the Fourth Circuit not only engaged in impermissible judicial redrafting, but it rendered the protections of the second clause meaningless. Under its interpretation, the only protection the PDA establishes for pregnant workers is that provided by the inclusion of "pregnancy" within the protected class "sex", a task accomplished by the straightforward language of the first clause. In assigning no additional meaning to the second clause, the Fourth Circuit's ruling violates the foundational canon of statutory interpretation to interpret statutory language to avoid surplusage. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Corley v. United States*, 556

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[8] Today, the effect of the ADA Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553, 42 U.S.C. § 12101, et seq., further highlights the problems in this analysis. The ADAAA, passed after the facts in this case, requires employers to make reasonable accommodations for workers with temporary disabilities, including "impairments" that result in temporary lifting restrictions, like Ms. Young's. *See* 29 C.F.R. § 1630.2(j)(1)(ix). Pregnancy itself, however, is not an "impairment." 29 C.F.R. § 1630.2(h). Under the Fourth Circuit's reasoning, an employer today could potentially justify denying accommodations to pregnant employees with multi-month lifting restrictions even when the employer consistently provided them to all non-pregnant employees with identical restrictions, by explaining non-pregnant employees were accommodated for the "pregnancy-neutral" reason of complying with the ADAAA. This would leave the second clause of the PDA a hollow promise.

U.S. 303, 314 (2009). Indeed, this Court expressly recognized the risk and error of doing so with respect to this specific language when it cautioned against "read[ing] the second clause out of the [Pregnancy Discrimination] Act." *Johnson Controls*, 499 U.S. at 205. In violation of this precedent, the Fourth Circuit adopted an interpretation that effectively eviscerates the protections in the second clause.[9]

II. The Legislative History of the PDA Confirms That the Decision Below Was Erroneous.

While the plain language of the PDA unambiguously reflects Congress's intent, that intent is further confirmed by reference to the statute's legislative history. "[P]roper construction [of a statute] frequently requires consideration of [its] wording against the background of its legislative history and in light of the general objectives Congress sought to achieve." *Wirtz v. Local 153, Glass Bottle Blower's Ass'n*, 389 U.S. 463, 468 (1968). The legislative history of the PDA makes clear that Congress's intent was to repudiate both the result and the reasoning of *Gilbert*, 429 U.S. 125. Indeed, the key, animating "central purpose" in passing the PDA was an intent to ensure that when

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[9] Moreover, just as this Court set aside EEOC guidance in *Gilbert*, the Fourth Circuit's decision also departs from the EEOC's interpretation of the PDA. *See* 29 C.F.R. § 1604, App. Q&A 5; EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

workers' physical ability to work is limited by pregnancy, they are granted the same benefits and conditions of employment as those whose ability to work is limited by other disabling conditions. *See, e.g.*, S. Comm. on Labor and Human Resources, 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, 62-63 (Comm. Print 1979) ("PDA Legislative History") (statement of Sen. Williams).

A. The Legislative History Shows the PDA Was Intended to Override the Supreme Court's Misreading of Title VII in *Gilbert*.

As this Court recognized in *Guerra*, 479 U.S. at 285, the legislative history of the PDA demonstrates that Congress intended to overrule *Gilbert*. *E.g.*, S. Rep. No. 95-331, at 2-3 (1977) (describing "our disagreement with the *Gilbert* decision" as a motivating purpose of Senate bill); H.R. Rep. No. 95-948, at 3 (1978), *reprinted at* 1978 U.S.C.C.A.N. 4749, 4751 (expressing disagreement with *Gilbert* decision's interpretation of Title VII as necessitating the PDA); *Hearings on S. 995*, *supra*, 31 (statement of Ethel Bent Walsh, Vice Chairman) ("This legislation [the PDA] has, of course become necessary only because of the Supreme Court's decision last term in *General Electric v. Gilbert*, [which] left a gaping hole in the protection afforded by Title VII to women."); *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and*

Labor, 95th Cong. 126 (1977) (statement of Drew S. Days, III, Assistant Attorney General, Civil Rights Division).

B. The Legislative History Demonstrates that Congress Expressly Intended to Enact a Standard that Required an Employer To Treat Pregnant Women The Same as Other Workers Similar in Their Ability or Inability to Work.

The legislative history of the PDA also confirms that the second clause has a separate and unique purpose: "it defines the appropriate standard for eliminating [pregnancy] discrimination, by providing that pregnant workers who are able to work shall be treated the same as other able workers, and that pregnant workers who are unable to work shall be treated the same as other disabled workers." *Hearing on H.R. 5055 and H.R.* 6075, *supra*, 32-33 (testimony of Susan Deller Ross, on behalf of the Campaign to End Discrimination Against Pregnant Workers). Congress declared that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working." S. Rep. 95-331, at 4. Proponents sought to pass a bill that "would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work," H.R. Rep. No. 95-948, at 4, *reprinted* at 1978 U.S.C.C.A.N. at 4752.

The second clause was thus intended "to specifically define the standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work," PDA Legislative History 206 (statement of Rep. Hawkins). Indeed, this Court has previously recognized Congress's intent, stating "we believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *Guerra*, 479 U.S. at 285.

Legislative history further clarifies that a primary motivating purpose of the PDA was to ensure that medical needs arising out of pregnancy are treated the same by employers as medical needs arising out of disabilities and that employers could no longer relegate pregnancy-related limitations to a separate class of disabilities incompatible with work. A committee report explained that "the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions." S. Rep. No. 95-331, at 4; *see also* PDA Legislative History 115 (statement of Sen. Bayh) ("The whole purpose of this bill is to say that if a corporation, a business is to provide disability [benefits] that they cannot discriminate against women because of the unique character of disability that might confront them[.]"). To ensure that determination of the availability of benefits did not focus on the unique condition of pregnancy, the bill required that pregnant workers be treated like other workers with similar ability or

inability to work. *See* PDA Legislative History 67 (statement of Sen. Javits) ("The bill requires equal treatment when disability due to pregnancy is compared to other disabling conditions. [T]he bill adopts as its standard equality of treatment and thereby permits the personnel and fringe benefit programs already in existence for other similar conditions to be the measure of an employer's duty toward pregnant employees."); *id.* at 65 (statement of Sen. Williams) ("The purpose of the bill is to insure [sic] that women who are disabled by conditions related to pregnancy are compensated fairly and given a fair amount of assistance with their medical bills, in relation to their fellow employees who are disabled by other medical conditions.").

Congress considered how to ensure that pregnant workers be treated the same as other workers. Indeed, the House Committee Report made clear that "[t]he bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work. The 'same treatment' may include employer practices of transferring workers to lighter assignments." *See* H.R. Rep. 95-948, at 4-5, *reprinted at* 1978 U.S.C.C.A.N. at 4752-53. The Senate Committee Report stated explicitly that the statute was intended to ensure that pregnant workers too "must be accorded the same rights, leave privileges and other benefits, as workers who are disabled from working." S. Rep. No. 95-331, at 4; *see also* PDA Legislative History 130-31 (statement of Sen. Cranston) ("Pregnant women who are able to

work must be permitted to work on the same conditions as other employees–and when they are not able to work for medical reasons they must be accorded the same rights, leave privileges, and other benefits as other employees who are medically unable to work."). As this history makes clear, Congress fully understood that the PDA would require an employer to provide pregnant workers the same type of accommodations that it provides to other employees.

C. The Decision Below Is in Contraposition to Congressional Intent and Reverts to Arguments Congress Rejected When Enacting the Legislation.

Despite the clear directives from Congress and this Court that the standard for measuring compliance with the PDA is comparing the treatment of pregnant workers with treatment of those who are similar in their ability to work, the Fourth Circuit's decision below reverts to the logic of *Gilbert* in finding that Title VII, even as amended by the PDA, only protects pregnant workers from policies that by their terms single out pregnancy or can be shown to be motivated by animus toward pregnant women. *Compare* Pet. App. 28a-29a (rejecting Ms. Young's claims because "a lack of charity does not amount to discriminatory animus directed at a protected class of employees") *with Gilbert*, 429 U.S. at 136, quoting *Geduldig*, 417 U.S. at 496-97 n.20 ("There is no more showing in this case than there was in *Geduldig* that the exclusion of pregnancy benefits is a mere 'pretex[t] designed to effect an invidious

discrimination against the members of one sex or the other.'"). Indeed, under the Fourth Circuit's analysis, the very disability insurance policy challenged in *Gilbert* would likely be permissible under the PDA, if by its terms it covered disabilities arising out of accidents or sickness and did not expressly note that pregnancy was thereby excluded; this would be a "pregnancy-blind" rule, absent a showing of animus motivating the exclusion. *See* Pet. App. 18a. In light of the express congressional repudiation of the reasoning and result in *Gilbert*, a legal analysis that would permit this result cannot be correct.

The Fourth Circuit expressed a concern that interpreting the PDA to provide pregnant workers the right to receive benefits whenever an employer provides benefits to another category of workers based on a similar inability to work would amount to preferential treatment for pregnant workers. Pet. App. 20a-21a. But similar arguments were considered—and rejected—during the debates over the PDA. Opponents of the PDA argued that "[t]he passage of this amendment would mean a permanent benefit imbalance in favor of women of child-bearing age," *Hearing on H.R. 5055 and H.R.* 6075, *supra*, at 260 (statement of National Retail Merchants Ass'n), and that the PDA "is an edict that a benefit will be granted to one class of women, those who are pregnant – and in effect discriminates against non-pregnant females and males," *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part II: Hearing on H.R. 5055 and H.R. 6075 Before the*

Subcomm. on Emp't Opportunities of the H. Comm. on Educ. and Labor, 95th Cong. 24 (1977) (testimony of the Electronic Industries Association, presented by Fred T. Thompson, Chairman of the Labor Relations Committee of EIA's Industrial Relations Council). *See also id.* at 38 (statement of Fred T. Thompson, Chairman of the Labor Relations Committee of EIA's Industrial Relations Council).

In response, proponents of the PDA explained that guaranteeing workers incapacitated by pregnancy the same treatment provided to other workers on the basis of incapacity does not improperly advantage pregnant workers. "This bill makes it clear that an employer must provide health and medical benefits on an equal basis, if he does so at all. It does not, however, require that an employer do anything more for his pregnant employees than he does for any other employees." PDA Legislative History 133 (statement of Rep. Mathias); *see also Hearing on H.R. 5055 and H.R.* 6075, *supra*, 171 (statement of Drew S. Days, III, Assistant Attorney General, Civil Rights Division) ("The proposed legislation does not purport to elevate pregnancy above other employment disabilities, and require employers to assume the costs of pregnancy when they would not do so with regard to other physical disabilities."). Although the PDA does not create an entitlement to pregnancy leave or other benefits where no worker receives leave or benefits based on inability to work, it does require that if a company provides a benefit to some groups of workers based on incapacity, that benefit must be provided to

pregnant workers similar to those workers in ability to work.

Respondent has argued that "[i]t is clear that Congress did not require employers to equate pregnancy with on-the-job conditions" and that "the legislative history is rife with examples specifically allowing employers to treat pregnant employees the same as employees injured off the job." Opp'n Cert. at 14. But Respondent misreads the legislative history. The legislative history of the PDA focuses closely on the type of disability insurance plan approved by the Court in *Gilbert* in explaining why the PDA would require an alternative result. That plan provided "nonoccupational sickness and accident benefits" to employees, other than pregnant employees. 429 U.S. at 128. The references in the legislative history to the PDA's requirement of equal treatment of pregnant employees and other employees with nonoccupational disabilities are a specific reaction to the Court's approval of that plan and similar plans, not a limitation on the PDA's reach. *See Newport News Shipbuilding*, 462 U.S. at 679 (noting that focus of congressional discussion at time of PDA's enactment "does not create a 'negative inference' limiting the scope of the [A]ct to the specific problem that motivated its enactment."). References to nonoccupational injuries during Congress's consideration of the PDA cannot be read to limit the plain language of the statute.[10]

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[10] Of course, in this case, UPS accommodated nonoccupational conditions as well as occupational conditions.

III. The Protection Afforded by the PDA's Requirement that Pregnant Workers Be Judged Solely on Their Ability or Inability to Work Remains Necessary Today.

Pregnant workers in the mid-1970s faced a myriad of stereotypes and assumptions about their ability to work and their commitment to work that often resulted in discriminatory treatment, including attempts to push them out of the workforce entirely. Congress passed the PDA because it understood that protections for pregnant workers were necessary, given a long history of employers forcing women off the job regardless of their actual ability to work and of treating pregnancy differently from other medical conditions. As the Senate Committee Report observed:

> Even more important than our disagreement with the *Gilbert* decision is the fact that the decision threatens to undermine the central purpose of the sex discrimination prohibitions of title VII. As the testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.

S. Rep. 95-331, at 3.

Similarly, the House Report emphasized:

> Women are still subject to the stereotype that all women are marginal workers. Until a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore the elimination of discrimination based on pregnancy in these employment practices in addition to disability and medical benefits will go a long way toward providing equal employment opportunities for women, the goal of Title VII of the Civil Rights Act of 1964.

H.R. Rep. 95-948, at 6-7, *reprinted at* 1978 U.S.C.C.A.N. at 4754-55; *see also, e.g.*, PDA Legislative History 181-82 (statement of Rep. LaFalce) ("Employers who believe pregnant women are unable to continue working or do not desire to work are imposing stereotypical notions on their employees [that] are archaic and undocumented by available statistics. The Supreme Court's ruling in *Gilbert* has served to reinforce the outdated argument that women depend upon men, and not their jobs, for support."); *id.* at 61 (statement of Sen. Williams) ("[M]ost policies and practices of discrimination against women in the workforce result from attitudes about pregnancy and the role of women who become pregnant which are inconsistent with the full participation of women in our economic system. Because of their capacity to become

pregnant, women have been viewed as marginal workers not deserving the full benefits of compensation and advancement granted to other workers."); *id.* at 129 (statement of Sen. Cranston) (the program at issue in *Gilbert* "demonstrates an example of the kind of sex stereotyping which has continually resulted in women being treated as second-class members of the work force").

The legislative history also demonstrates that a specific purpose of the PDA was to ensure that workers who had medical needs arising out of pregnancy would not be pushed onto unpaid leave, or out of work entirely, with potentially severe financial consequences for women and their families. In introducing the bill, Senator Harrison Williams stated:

> I am afraid that lurking between the lines of the *Gilbert* opinion is the outdated notion that women are only supplemental or temporary workers – earning "pin money" or waiting to return home to raise children full-time If [the law] is not changed, countless women and their families will be forced to suffer unjust and severe economic, social and psychological consequences. Many women disabled by pregnancy and childbirth will be forced to take leave without pay. The resulting loss of income will have a devastating effect

> on the family unit. The loss of a mother's salary will make it difficult for families to provide their children with proper nutrition and health care.

PDA Legislative History 3 (statement of Sen. Williams); *see also, e.g., id.* at 7 (statement of Sen. Brooke) ("[T]he effect of the Gilbert decision on these working women and their families could be devastating. Many women temporarily disabled by pregnancy will be forced to take leave without pay. In so doing, they must forfeit the income which holds their family together, which helps assure their children adequate nutrition and health care, and which helps keep their family off welfare."); *id.* at 12 (statement of Rep. Hawkins) ("The Court's decision [in *Gilbert*] will have a particularly severe impact on low-income workers who may be forced to go on leave without pay for childbirth or pregnancy-related disabilities. This loss of income may have serious repercussions for families dependent upon the wife's earnings.").

Many of the policies that push pregnant women out of work, and which the PDA was adopted to prohibit, are rooted in negative assumptions and stereotypes about working mothers. Unfortunately, decades after passage of the PDA, mothers continue to face stereotypes in the workplace, which circumscribe their opportunities. As this Court recognized as recently as 2003 in *Nevada Department of Human Resources v. Hibbs*:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.

538 U.S. 721, 736 (2003).

Social science confirms that women who become pregnant and who become mothers continue to struggle with the effects of false assumptions and stereotypes about the incompatibility of pregnancy or motherhood with paid work. *See, e.g.*, Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 Hastings L.J. 1359, 1386 (2008) ("Mothers (including expectant mothers) experience discrimination when they are being evaluated for hire and promotion, as well as on their job performance."). Indeed, recent research has confirmed that mothers are perceived as "less competent" and are less likely to be considered for high-level managerial positions than other female or male applicants. Madeline E. Heilman & Tyler G.

Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. Applied Psychol. 189, 197 (2008); *see also* Amy J.C. Cuddy et al, *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. Soc. Issues 701, 711 (2004) ("Perhaps most noteworthy, participants expressed less interest in hiring, promoting, and educating the working mother compared to the childless woman."). Recent jury awards confirm that employers have continued to discriminate against pregnant workers and working mothers on the basis of these stereotypes. *See, e.g., Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (affirming jury verdict where defendant's manager admitted to failing to consider plaintiff for a promotion due to his assumptions that she would not want to relocate with her children); *Taylor v. Bigelow Mgmt., Inc.*, 242 F. App'x 178, 180 (5th Cir. 2007) (upholding jury verdict finding plaintiff had been demoted due to her pregnancy where her supervisor commented on the non-suitability of women for management positions because they get pregnant and miss work); *Walsh v. Nat'l Computer Sys., Inc.*, 332, F.3d 1150, 1160 (8th Cir. 2003) (affirming jury verdict in favor of plaintiff who was treated differently while pregnant and subjected to discriminatory comments upon her return from maternity leave).

Through its misreading of the PDA, the Fourth Circuit's decision undermines the law's protections against policies that push workers with limitations arising out of pregnancy off of the job. It thus threatens the protection the PDA offers against

adverse employment action on the basis of these stereotypes.

IV. The Proposed Pregnant Workers Fairness Act Would Reaffirm the PDA's Requirement that Pregnant Workers Receive Equal Treatment.

Undersigned *amicus* Representative Jerrold Nadler and undersigned *amici* Senator Robert P. Casey, Jr., and Senator Jeanne Shaheen have recently introduced the Pregnant Workers Fairness Act ("PWFA"), S.942, 113th Cong. (2013); H.1975, 113th Cong. (2013), a bill that currently has 140 co-sponsors in the House and 30 co-sponsors in the Senate. The PWFA would explicitly require employers to make reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions unless such accommodations would impose an undue hardship—the same accommodations that the Americans with Disabilities Act (ADA) requires employers to provide for workers with disabilities. Initially introduced in 2012, the PWFA (which has not yet passed) was drafted to respond to the improper narrowing and misreading of the PDA by some lower courts, including that of the district court in Petitioner's case. *See, e.g.*, Letter from Hon. Jerrold Nadler to House of Representatives Colleagues (May 2, 2013) ("Congress passed the Pregnancy Discrimination Act of 1978 in order to end discrimination against pregnant workers. But thirty five years later, women still risk being forced out of the workplace if and when they become pregnant."); 158 Cong. Rec. H2459 (daily ed. May 9, 2012) (statement of Rep.

Nadler) ("Case law shows that courts are uncertain, even confused, about the scope of the law, requiring Congress to set the record straight."); Letter from Sen. Robert P. Casey, Jr. and Sen. Jeanne Shaheen to Senate Colleagues (May 8, 2013) ("Congress made a commitment to end discrimination against pregnant workers over 30 years ago. Unfortunately, too many women are still being forced to choose between healthy pregnancies and keeping their jobs.")

By explicitly adopting the "reasonable accommodation" and "undue hardship" definitions from the ADA, the PWFA would apply the same standard to accommodations for limitations arising out of pregnancy as the ADA applies to accommodations for disabilities. This reflects and reaffirms the PDA's guarantee of equal treatment for workers whose ability to work is affected by pregnancy and those whose ability to work is affected by disability. The PWFA would also streamline the proof requirements for pregnant workers denied these accommodations by ensuring that a worker with a limitation arising out of pregnancy did not have to identify a non-pregnant comparator in any particular case who had already received the reasonable accommodation sought.

Any argument that the introduction of the PWFA is evidence that the PDA does not currently provide accommodation rights in cases like this one is meritless and gravely misreads the intent of the

PWFA's sponsors.[11] The PWFA was drafted to reaffirm the PDA's requirement of equality of treatment using an alternative model, in order to ensure women would no longer be harmed by erroneous decisions like those below. That is, the central motivating purpose of the PWFA is to ensure compliance with the PDA's mandate that those whose ability to work is affected by pregnancy are treated as well as those whose ability to work is affected by disability. *Amici*, many of whom are co-sponsors of the PWFA, believe that reversal of the Fourth Circuit decision is compelled by the PDA.

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[11] Moreover, a proposed bill on which Congress has taken no formal action does not change the plain language of a previously enacted statute, nor does it amend that statute's legislative history.

CONCLUSION

For the foregoing reasons,, *amici* urge the Court to grant the appeal of Peggy Young and reverse the judgment of the U.S. Court of Appeals for the Fourth Circuit.

Dated: September 11, 2014

Respectfully submitted,

Emily Martin
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W.
Suite 800
Washington, DC 20036
(202) 319-3049

Andrew H. Bart
Counsel of Record
Anne Cortina Perry
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600
abart@jenner.com

Counsel for *Amici Curiae*

ADDENDUM

Appendix A: Identity of Individual *Amici*

Robert P. Casey, Jr.*
Jeanne Shaheen*
Tammy Baldwin*
Mark Begich*
Richard Blumenthal*
Barbara Boxer*
Sherrod Brown*
Benjamin L. Cardin*
Christopher A. Coons*
Richard J. Durbin*
Al Franken*
Tom Harkin*
Mazie K. Hirono*
Tim Kaine*
Patrick Leahy*
Joe Manchin III
Edward J. Markey*
Jeff Merkley*
Barbara A. Mikulski*
Christopher S. Murphy*
Patty Murray*
Harry Reid
Brian Schatz*
Charles E. Schumer*

Nancy Pelosi
Steny H. Hoyer
Jerrold Nadler*
Diana DeGette*
Louise McIntosh Slaughter*
John Conyers, Jr.*

George Miller*
Elijah E. Cummings*
Robert A. Brady*
Karen Bass*
Ami Bera*
Suzanne Bonamici*
Corrine Brown*
Julia Brownley*
Lois Capps*
Tony Cárdenas*
Matt Cartwright*
Kathy Castor
Donna M. Christensen*
Judy Chu*
David N. Cicilline*
Katherine Clark*
Yvette D. Clarke*
Steve Cohen*
Jim Cooper*
Joseph Crowley*
Susan A. Davis*
Peter A. DeFazio*
John K. Delaney*
Rosa L. DeLauro*
Suzan K. DelBene*
Theodore E. Deutch*
Donna F. Edwards*
Keith Ellison*
Anna G. Eshoo*
Elizabeth H. Esty*
Chaka Fattah*
Bill Foster*
Lois Frankel*

Marcia L. Fudge*
John Garamendi*
Raúl M. Grijalva*
Luis Gutiérrez*
Janice Hahn*
Alcee L. Hastings*
Colleen W. Hanabusa*
Brian Higgins*
Michael M. Honda*
Jared Huffman*
Steve Israel*
Sheila Jackson Lee*
Hakeem S. Jeffries
Henry C. "Hank" Johnson*
Marcy Kaptur*
Joseph P. Kennedy, III
Ann McLane Kuster*
Barbara Lee*
Sander M. Levin*
Zoe Lofgren*
Nita M. Lowey*
Michelle Lujan Grisham*
Carolyn B. Maloney*
Doris O. Matsui*
Betty McCollum*
Jim McDermott*
James P. McGovern*
Jerry McNerney*
Grace Meng*
Gwen Moore*
James P. Moran*
Grace F. Napolitano*
Richard M. Nolan*

Eleanor Holmes Norton*
Bill Pascrell, Jr.*
Ed Perlmutter*
Gary Peters*
Scott H. Peters*
Chellie Pingree*
Mark Pocan*
Jared Polis*
Charles B. Rangel*
Lucille Roybal-Allard*
Bobby L. Rush*
John P. Sarbanes*
Jan Schakowsky*
Adam B. Schiff*
Allyson Y. Schwartz*
Robert C. "Bobby" Scott*
José E. Serrano*
Carol Shea-Porter*
Jackie Speier*
Eric Swalwell*
Mark Takano*
Paul Tonko*
Niki Tsongas*
Chris Van Hollen*
Nydia M. Velázquez *
Henry A. Waxman*
Debbie Wasserman Schultz*

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION; SERVICE EMPLOYEES INTERNATIONAL UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; AND AMERICAN FEDERATION OF TEACHERS, AFL-CIO IN SUPPORT OF THE PETITIONER

JUDITH A. SCOTT
NICOLE G. BERNER
JENNIFER L. HUNTER
Service Employees International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 730-7383
judy.scott@seiu.org

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
CHAKA DONALDSON
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035
aobrien@nea.org

[ADDITIONAL COUNSEL ON INSIDE COVER]

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

WILLIAM LURYE
PAULA J. CAIRA
American Federation of State, County and Municipal Employees, AFL-CIO
1625 L Street, N.W.
Washington, D.C. 20036
(202) 429-1293
BLurye@afscme.org

DAVID STROM
American Federation of Teachers, AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472
dstrom@aft.org

NICHOLAS W. CLARK
United Food and Commercial Workers International Union, AFL-CIO
1775 K Street, N.W.
Washington, D.C. 20036
(202) 223-3111
nclark@ufcw.org

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INTEREST OF AMICI CURIAE

This brief is submitted with the consent of the parties on behalf of the National Education Association (NEA), the Service Employees International Union (SEIU), the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME), the United Food and Commercial Workers International Union, AFL-CIO (UFCW), and the American Federation of Teachers, AFL-CIO (AFT) as *amici curiae* in support of the Petitioner, Peggy Young.[1]

NEA is a nationwide employee organization with nearly three million members, the vast majority of whom serve as educators and education support professionals in our nation's public schools, colleges, and universities. NEA has a strong interest in ensuring that its members—approximately 64% of whom are women—receive the full protections of the Pregnancy Discrimination Act (PDA). NEA and its members are also deeply committed to the notion that all persons, regardless of gender, must have equal opportunity for employment, promotion, compensation, and leadership in all activities and, further, that federal laws such as the PDA are essential to securing those opportunities.

SEIU is a labor organization that represents over two million men and women working in health care, property services, and public services throughout the United States. As SEIU's Mission Statement provides,

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[1] Letters of consent from all parties are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

the union is committed to bringing "economic and social justice to those most exploited in our community — especially to women and workers of color." Fifty-six percent of SEIU's members are women, and many of them work in so-called "pink collar" professions such as home care, nursing, and child care. These women workers, who are often underpaid and whose jobs are physically demanding, are in particular need of the protection promised in the PDA so that they can continue to work to provide for their families during pregnancy.

AFSCME is a labor organization representing 1.6 million working men and women who provide vital public services around the nation. AFSCME represents members in hundreds of different occupations, including nurses, child-care providers, corrections officers, EMTs, sanitation workers, and more. Women make up 58% of AFSCME's membership. AFSCME advocates for fairness in the workplace for working women both at the bargaining table and in the halls of government. AFSCME has a long history of promoting gender equality and supporting the employment rights of pregnant workers aimed at achieving prosperity and opportunity for all of America's working families.

UFCW is a labor organization of 1.3 million members representing workers across the United States in the retail food, non-food retail, poultry, meatpacking, food processing, healthcare, and chemical industries. UFCW members confront persistent challenges across the industries in which they are employed that operate to reduce their standard of living, including employment discrimination. UFCW organizes and represents workers and fights to strengthen labor, civil, and human rights for all workers. Most of UFCW's

membership are women, and most of those women are of childbearing age. A robust PDA is key to protecting these workers from pregnancy discrimination in employment.

AFT represents 1.5 million members who are employed across the nation and overseas in K-12 and higher education, public employment, and healthcare. Over 60% of its members are women. AFT has a strong interest in supporting civil rights issues, such as gender and pregnancy discrimination, and regularly participates in litigation fighting bias in the workplace. More than 36 years ago, AFT actively supported the passage of the PDA because the prohibition of pregnancy-related discrimination is essential to the ultimate fair and equal treatment of women in the workplace.

Amici believe that their role as labor organizations that represent millions of working women nationwide gives them a unique perspective on the seniority and collective-bargaining issues raised by the Respondent, United Parcel Service (UPS), and that their views on these issues will greatly assist the Court in resolving this case correctly.

INTRODUCTION AND SUMMARY

As labor organizations that represent millions of working women throughout the country, *Amici* believe that the Pregnancy Discrimination Act (PDA) — including its requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . as other persons . . similar in their ability or inability to work," 42 U.S.C. § 2000e(k) — is essential to the empowerment of those workers and to

the improvement of workplace culture and practices for all women.

Amici submit this brief in support of the Petitioner, Peggy Young, to address the seniority and collective-bargaining issues first raised by the Respondent, United Parcel Service (UPS), in its brief in opposition to *certiorari*. In particular, UPS contends that its collective-bargaining agreement excuses it from the PDA's substantive obligation to treat pregnant workers the same as other workers who are similar in their ability or inability to work, and that Title VII's provision exempting certain seniority systems from antidiscrimination scrutiny applies to Young's PDA challenge. These contentions are without merit.

First, UPS's claim that collective-bargaining agreements are "controlling" over the PDA's substantive protections is baseless. Quite to the contrary, an employee's protections under the federal civil rights laws, including those secured by the PDA, are not forfeited or supplanted simply because the employees of that employer have exercised their rights to form and join a union for purposes of collective bargaining. In fact, it can easily be the case that the benefits a union negotiates for one group of workers must also be extended to women affected by pregnancy, childbirth, or related medical conditions since, by operation of the PDA's plain terms, those workers must be treated the same as other workers who are similar in their ability or inability to work.

Next, this Court should reject UPS's claim that it was privileged under Title VII's seniority provisions to deny Young's request for light duty on the same terms as other employees who are similar in their ability to

work. As a threshold matter, this argument was not properly presented because UPS did not raise it before the district court or court of appeals below. And, the argument must fail in any event, for the simple reason that Title VII's protections for certain bona fide seniority systems do not apply to policies that are based on factors *other* than just an employee's length of service — such as the ones that give rise to Young's claim here. At the end of day, even if UPS assigned some light duty work on the basis of seniority, it still maintained significant non-seniority-based exceptions to that policy that, on their face, failed to treat pregnant women the same as others who were similar in their ability or inability to work. Nothing in Title VII's protections for bona fide seniority systems can be read to save such a practice.

ARGUMENT

Throughout its brief in opposition to *certiorari*, UPS makes the argument — which it will presumably maintain in its merits brief — that its collective-bargaining agreement with the union representing its employees excuses it from the substantive obligation under the Pregnancy Discrimination Act (PDA) to treat pregnant workers the same as other workers who are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). The thrust of UPS's argument on this score is that a ruling in Young's favor on her PDA claim would necessarily violate the collective-bargaining agreement and deprive other UPS workers of their bargained-for rights and benefits under that agreement. *See* Opp. Cert. at 4 (arguing that the "collective bargaining agreement neither requires nor authorizes" allowing pregnant employees to have temporary, light-

duty positions on the same terms as other employees who are similarly limited in their ability to work); *id.* at 10 ("[T]he accommodation [Young] requested would have required UPS to give her preferential treatment in contravention of the collective bargaining agreement."); *id.* at 16 ("[Young]'s construction [of the PDA] would allow courts to override the terms of collective bargaining agreements "); *id.* ("[S]uch agreements are ordinarily controlling."); *id.* at 16-17 (arguing that a ruling in Young's favor would require "a court to set aside a collective bargaining agreement"). Stated differently, UPS effectively contends that Young would, by virtue of her pregnancy, only be entitled to be treated the same as other workers "similar in their ability or inability to work" if UPS and the union representing its employees had explicitly agreed to provide such protection in collective bargaining.

UPS's argument is wrong in every particular. It betrays a fundamental misunderstanding of the interaction between collective bargaining and federal employment and antidiscrimination laws. It also misconstrues both the scope of Title VII's provisions relating to bona fide seniority systems and the essential thrust of Young's claims in the case, which do not challenge any seniority-based feature of UPS's policies. As we will show, a fundamental premise of federal employment and antidiscrimination laws is that employees' substantive rights—including those secured by the PDA—are not supplanted or preempted by the existence of a collective-bargaining agreement. Instead, those substantive rights generally exist as a floor on top of which any rights or benefits obtained through the process of collective bargaining are added. Fur-

thermore, Title VII's seniority-related provisions are inapplicable where, as here, they are not only raised belatedly and without an adequate record, but also against a challenge involving only the aspects of an employer's light-duty policy that are not based on seniority. Indeed, UPS's arguments are particularly unjustified here, since the applicable collective-bargaining agreement may well envision precisely the kind of relief that Young seeks.

A. Collective-Bargaining Agreements Do Not Preempt or Supplant the Substantive Protections of Federal Civil Rights Laws Such as the PDA

Employees who exercise their statutory rights under federal or state law to form a union and to bargain collectively with their employer remain entitled to the substantive protections of the federal civil rights and antidiscrimination laws, which Congress enacted to protect all workers. That is because this latter set of rights derives not from the collectively bargained "system of industrial self-government," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960), but from the "statutes governing relationships between employers and their individual employees, [which] guarantee covered employees specific substantive rights," *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 734 (1981). Thus, when unionized workers sit down to bargain with an employer, they do not start from scratch, forced to negotiate back from the employer the general public-law protections that non-unionized workers enjoy.

To be sure, many collective-bargaining agreements

incorporate or improve upon the protections already provided by federal or other laws.[2] Here, for instance, the applicable collective-bargaining agreement between UPS and the Teamsters explicitly provides that "The Parties agree to abide by the provisions of the Americans with Disabilities Act." J.A. 548. Workers and their unions choose to bargain for such provisions for a variety of reasons. As is true of the ADA provision in UPS's agreement with the Teamsters, these contractual provisions often elaborate on the law's guarantees, setting forth concrete procedures as to how an abstract standard like the ADA's "reasonable accommodation" requirement will be put into practice. *See id.*[3] Also, the grievance and arbitration systems generally contained in a collective-bargaining agreement may allow unions to achieve faster remedies for the workers they represent than are available

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[2] *See, e.g.*, *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 72-73, (1998); *2012 Commercial Building Agreement Between Local 32BJ Service Employees International Union and the Realty Advisory Board on Labor Relations* 104 ("[I]n cases of pregnancy, it shall be treated as any other disability suffered by an employee in accordance with applicable law."), *available at* http://www.seiu32bj.org/wp-content/uploads/2014/06/32BJ-Comm-Bldg-Agreement-NYC.pdf.

[3] *See also* AFSCME, *Fighting for the Rights of Employees with Disabilities: An AFSCME Guide* (recommending the negotiation of contract language that includes general compliance with the ADA, regular labor-management committee meetings on issues including accommodations of people with disabilities, and the right to union representation in the process to identify a "reasonable accommodation"), *available at* http://www.afscme.org/news/publications/for-leaders/fighting-for-the-rights-of-employees-with-disabilities-an-afscme-guide/negotiating-favorable-contract-language.

through the courts or administrative agencies.[4] Yet, even though some collective-bargaining agreements may *reference* the substantive protections of federal law, it remains a basic principle that unionized employees do not have to make concessions at the bargaining table in order to *receive* them.

That workers do not have to bargain to win the protections of federal antidiscrimination laws such as the PDA follows directly from this Court's recognition that an employer and union cannot agree in a collective-bargaining agreement to waive the substantive protections of federal civil rights laws. *See 14 Penn Plaza v. Pyett*, 556 U.S. 247, 273 (2009) ("[A] substantive waiver of federally protected civil rights will not be upheld.") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991)); *id.* at 265 ("[F]ederal antidiscrimination rights may not be prospectively waived."). And, from this it follows even more clearly that an employer and union cannot constructively, or by implication, waive employees' substantive protections under federal civil rights laws simply by failing to explicitly *include* them in the agreement.[5] *Id. See*

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[4] *See, e.g.*, Am. Fed'n of Gov't Employees, *Bargaining for Health and Safety Protection* (recommending the negotiation of provisions that incorporate the protections of the Occupational Safety and Health Act so that the union may "file a grievance if they are not followed" and thereby "strengthen [the employees'] health and safety program"), *available at* https://www.afge.org/Index.cfm?page=BargainingforHealthSafetyProtection.

[5] This Court has held that certain *procedural* rights contained in federal statutes—namely, an individual's right to sue in court for claims of discrimination—may be waived by a

also Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1046 n.9 (7th Cir. 1996) (declining to hold that "provisions of collective bargaining agreements will preempt a covered entity's duty to reasonably accommodate a disabled employee under the ADA").

The PDA — including its requirement that employers treat pregnant workers the same as other workers "similar in their ability or inability to work" — is no different. Nothing in the text of the PDA remotely suggests that its substantive protections, unlike those contained in other federal civil rights statutes, are somehow uniquely amenable to either express or implied waiver in a collective-bargaining agreement. And, since the time of the PDA's introduction and passage into law, it has been the common understanding among the unions that negotiate these agreements with employers that, even though unions may negotiate for more robust protections for pregnant workers, the PDA establishes a statutory

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collective-bargaining agreement's arbitration provision. *See 14 Penn Plaza*, 556 U.S. at 274. But, such a waiver must be unambiguous and cannot have the effect of eliminating a worker's substantive rights. *See id.* at 251, 273-74 (holding that "a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment Act" is enforceable only if the collective-bargaining agreement allows a worker to "effectively vindicat[e]" her "federal statutory rights in the arbitral forum") (citation and internal quotation marks omitted). These limitations on the contractual waiver of *procedural* rights serve to emphasize that *substantive* statutory antidiscrimination protections cannot be waived by a collective-bargaining agreement or other private contract.

floor of substantive rights that cannot be traded away.[6]

For example, during the House subcommittee hearings on the bill that would become the PDA, the AFL-CIO's Special Counsel, Laurence Gold, analogized the PDA to other federal statutory protections, testifying:

> Collective bargaining starts from the essential premises, where you cannot have a collective bargaining agreement for a $2 wage in this country, even if the employer is strong enough, and the union is so weak that that is the best you could get. Under the Occupational Safety and Health Act, [. . .] you cannot bargain for unsafe conditions. We believe that [the PDA] is precisely the same type of matter.

HEARING BEFORE THE SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR ON H.R. 5055 AND 6075 (VOL. 1) 83 (April 6, 1977). And, in response to Congressman Augustus Hawkin's comment that "I don't think you can collectively bargain that which the public law prohibits you to do," Mr. Gold replied, "I have nothing to add except we are in entire agreement." *Id.*

Accordingly, UPS's contention that collective-bargaining agreements are "controlling" over the PDA's substan-

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[6] *See, e.g.*, Judith A. Scott, *Why a Union Voice Makes a Real Difference for Women Workers: Then and Now*, 21 YALE J. L. & FEMINISM 233, 235-36 (2009) (explaining that, after the passage of the PDA in 1978, the United Auto Workers and other unions helped to enforce and amplify the basic job protections of the PDA "by integrating the legislation into collective bargaining provisions, conducting internal education, and remedying violations through the contract grievance/ arbitration procedure").

tive protections, Opp. Cert. at 16, is plainly wrong. A union and employer cannot negotiate an agreement that targets or excludes pregnancy for adverse treatment. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-84 (1983). To hold otherwise would effectively return the law to this Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which prompted Congress to pass the PDA in the first place.

After all, the employer's policy at issue in *Gilbert* that excluded pregnancy from disability coverage was itself the product of a collective-bargaining agreement between the employer and the union. *See Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 369-70 (E.D. Va. 1974), *aff'd*, 519 F.2d 661 (4th Cir. 1975), *rev'd*, 429 U.S. 125 (1976). So it is inconceivable, as well as inconsistent with the plain language of the PDA, that Congress would have reacted to the *Gilbert* decision so quickly by passing the PDA, but without disturbing *Gilbert*'s holding as to the very kinds of collectively-bargained policies at issue in that case. *See Newport News Shipbuilding*, 462 U.S. at 678 (noting that, with the passage of the PDA, "Congress ... unambiguously expressed its disapproval of both the holding and the reasoning of *Gilbert*").

It is similarly undeniable that the *omission* of any explicit reference to pregnancy rights in the agreement's discussion of particular employment policies (such as UPS's light-duty policy) does not operate as a constructive or implicit waiver of employees' rights under the PDA. Indeed, under the plain language of the PDA, the opposite can often be true. The PDA provides that "women affected by pregnancy or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but

similar in their ability or inability to work." 42 U.S.C. § 2000e(k). Thus, to the extent a union and employer negotiate employment-related rights or benefits for workers who are "similar in their ability or inability to work" to "women affected by pregnancy . . . or related medical conditions," those benefits *must*, by operation of the PDA's plain language, be accorded to pregnant women as well, even if the employer did not or would not provide them in the absence of collective bargaining.

In its recently issued enforcement guidance on the PDA, the Equal Employment Opportunity Commission (EEOC) fully endorses that proposition in language of particular relevance to this case, stating that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)." EEOC, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* § I.A.5 (July 14, 2014) (*EEOC Guidance*); *see also id.* § I.C ("An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work . . . .")

UPS's attempt to claim that its collective-bargaining agreement excused its refusal to grant Young's request for light duty or other accommodation is particularly unavailing here because UPS took that position *in spite of*, not because of, language in its agreement that addresses this issue. Article 16, Section 4 of the collective-bargaining agreement, entitled "Maternity and Paternity

Leave," provides that "[a] light duty request, certified in writing by a physician, shall be granted in compliance with state or federal laws, if applicable." J.A. 592. Thus, the agreement seemingly contemplates the very result Young urges here, which is that the PDA be held to mandate the provision of temporary light duty for pregnant women on the same terms as it is provided to others who are similarly limited in their ability to work. In the proceedings below, UPS made clear that its "policy and practice" was to deny light duty to pregnant workers without regard to this provision of its agreement. *See* J.A. 571("My policy and practice, and the policy and practice within the Metro D.C. District, was to treat pregnancy the same as any other off-the-job injury or medical condition."). Having embarked on that "policy and practice" in the face of contrary language in the agreement, UPS certainly cannot now claim that its actions were somehow required by the agreement.

B. This Court Should Reject UPS's Belated Assertion that Title VII's Seniority Provision Insulates it from Liability on Young's PDA Claim

UPS also contends that it was privileged under Title VII's seniority provision, § 703(h),[7] to deny Young's re-

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[7] Section 703(h) provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e–2(h).

quest for light duty on the same terms as other employees who were similar in their ability to work. *See* Opp. Cert. at 13; *see also id.* at 4 (arguing that granting Young's request would "disrupt the seniority system"); *id.* at 16-17 (arguing that "petitioner is essentially asking to jump the line in the seniority system"). This Court should reject that argument because it was not raised or developed below. And, based on the incomplete record that was developed, it appears this argument lacks merit in any event.

1. As an initial matter, this Court should not entertain UPS's argument under § 703(h) because it has not been properly presented or preserved. It is well established that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). This requirement, like the more general obligation to raise issues in a timely fashion, allows those issues to be considered and resolved in the first instance by the lower courts that are "ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett v. United States*, 556 U.S. 129, 134 (2009).

That rule has particular application here. UPS did not raise § 703(h) before the district court or the court of appeals. *See* Pet. Br. at 50; Pet. Cert. Reply at 6-7. As a result, the parties did not develop an adequate record for this Court to determine the basic facts or to rule on the full range of issues involved. Most critically, the record below does not even contain the provisions of the collective-bargaining agreement that

purportedly establish a seniority-based system for light-duty and inside-work assignments.[8] Moreover, if UPS had raised the application of § 703(h) in a timely fashion, Young could have developed additional evidence showing that there was no conflict between granting Young's light-duty request and the seniority system — either because no more senior worker would have been "bumped" or displaced if the assignment were made,[9] or because the assignment was consistent with the provision of the maternity policy that allows "[a] light duty request, certified in writing by a physician, [to] be granted in compliance with state or federal laws," J.A. 592. Finally, Young could have demonstrated the seniority system was not a valid defense because UPS's treatment of her was "the result of an intention to discriminate," 42 U.S.C. § 2000e–2(h), *i.e.*, an intent to provide light duty work opportunities to employees who are "similar [to pregnant women] in their ability or inability to work," but not to pregnant women, *id.* § 2000e(k). This Court should not indulge

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[8] In the proceedings before the district court, UPS made only a fleeting reference to seniority, which it supported only with a reference to Young's own deposition testimony. *See* Dist. Ct. Dkt. 60-1 at 8. This does not establish the existence of a collectively bargained seniority system, which would ordinarily need to be proven by introducing the relevant provisions of the bargaining agreement. *See generally* Fed. R. Evid. 1002.

[9] *See infra* at 21-22 and Pet Br. at 9 (noting that a UPS manager, speaking for the company pursuant to Fed. R. Civ. P. 30(b)(6), testified that drivers who had lost their certifications and received inside-work reassignments "typically d[id] not displace any incumbent employees, because '[u]sually there will be positions available that they can just slide into'") (quoting J.A. at 261).

UPS's attempt to inject these underdeveloped issues into the case at this late date.

2. If this Court excuses UPS's failure to raise the § 703(h) issue below, it should nevertheless reject UPS's argument that a bona fide seniority system insulates it against Young's PDA claim. Young's PDA claim does not challenge any seniority-based feature of UPS's policies, so neither her claim nor UPS's asserted defenses to that claim fall within § 703(h)'s exemption for seniority systems. Moreover, the available facts indicate that granting Young's request would not have violated the seniority system in any event.

"'[S]eniority systems are afforded special treatment under [§ 703(h)]' , reflecting Congress's understanding that their stability is valuable in its own right." *AT & T Corp. v. Hulteen*, 556 U.S. 701, 708 (2009) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977)). These systems assure "consistent, uniform treatment" in determining such workplace rights and benefits as pensions, promotions, job assignments, and layoffs, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002), and they are of "'overriding importance' in collective bargaining," *American Tobacco Co. v. Patterson*, 456 U.S. 63, 76 (1982) (quoting *Humphrey v. Moore*, 375 U.S. 335, 346 (1964)). To that end, § 703(h) provides certain protections against discrimination claims for this key element of the collective-bargaining process that "lies at the core of our national labor policy." *Hardison*, 432 U.S. at 79.

Nevertheless, neither Young's claim nor UPS's asserted defense to that claim falls within § 703(h)'s exemption for bona fide seniority systems. That is

because Young's PDA claim does not challenge any seniority-based feature of UPS's policies. Instead, her claim is directed at, and arises from, UPS's policies that grant temporary light-duty and inside work assignments *without regard to seniority* to other employees who were similar to Young in their ability or inability to work.

As this Court has explained, the "principal feature of any and every 'seniority system'" covered by § 703(h) is that, "[u]nlike other methods of allocating employment benefits and opportunities ," it allocates benefits and opportunities "on the basis of some measure of time served in employment." *Cal. Brewers Ass'n v. Bryant*, 444 U.S. 598, 606 (1980). And, while it is true that some seniority schemes may consider an employee's length of service "in tandem with non-'seniority' criteria," this Court has made clear that only the "'seniority' aspects of such a scheme. might be covered by § 703(h)," but that "does not mean that the [non-seniority factors] would also be so covered." *Id.* at 606 & n.13; *see also United States v. City of Cincinnati*, 771 F.2d 161, 168 (6th Cir. 1985) (concluding that non-seniority-based features of the employer's layoff policy were "an appendage" to an otherwise seniority-based system and, as such, are not covered by § 703(h)). Thus, even if the record made clear that seniority played a role in the assignment of light duty in some cases, that would not immunize the policies at issue here, under which light duty is granted without regard to seniority to several classes of workers who are "similar [to pregnant women] in their ability or inability to work," but not to pregnant women. 42 U.S.C. § 2000e(k). These policies do not operate on "the basis of some measure of time served in employ-

ment," *Cal. Brewers Ass'n*, 444 U.S. at 606, and they are therefore outside the scope of any limitation § 703(h) places on liability under the PDA.[10]

To illustrate the point further, imagine that an employer maintained a seniority-based bidding system for light-duty assignments, but made exceptions to that system, without regard to their seniority, for all injured employees of a particular race, sex, or religion. That employer obviously could not invoke the protections of § 703(h) in a challenge to such a discriminatory practice. *See id.* at 606 & n.13. The same is true for UPS with respect to its denial of temporary light-duty assignments to a pregnant worker here: even if it assigned *some* light-duty work based strictly on seniority, it nevertheless maintained non-seniority-based exceptions to that policy that, on their face, qualify as prohibited discrimination under Title VII be-

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[10] In its recently released guidance, the EEOC states:

> [T]he PDA explicitly provides that the presence of a seniority system does not permit an employer to treat pregnant workers differently from workers similar in their ability or inability to work. *See* 42 U.S.C. § 2000e(k) ("and nothing in section 703(h) of this title shall be interpreted to permit otherwise"). An employer may not turn down a pregnant worker's request for light duty on the basis that such positions are awarded through seniority.

EEOC *Guidance* § I.C.1.b n.103. Whether this passage fully captures the interaction between the PDA and § 703(h), *cf. Hulteen*, 556 U.S. at 709 n.3, is a question that does not need to be resolved here. Young's claim rests entirely on the features of UPS's temporary work assignment policies that are themselves discriminatory and are not based on seniority. That being the case, UPS cannot invoke the protection of § 703(h) in any event.

cause they failed to treat "women affected by pregnancy or related medical conditions the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). In both instances, the employer is maintaining non-seniority-based exceptions that Title VII defines as discriminatory, and nothing in § 703(h) can be read to save those exceptions.

This result makes sense, not only because of the PDA's overarching goal of eradicating practices that diminish the employment opportunities of pregnant women, but also because this Court has recognized that non-seniority-based elements or exceptions to a seniority-based system tend to undermine any protections that system might otherwise deserve. In the context of employee accommodations under the Americans with Disabilities Act, this Court stated that an otherwise seniority-based system may contain sufficient "departure[s]," "exceptions," and other non-seniority-based features that it will no longer engender "employee expectations that the system will be followed." *Barnett*, 535 U.S. at 405.

That is particularly true here. The collective-bargaining agreement that covered Young provided temporary alternative work to employees "unable to perform their normal work assignments due to an on-the-job-injury." J.A. 584. UPS also provided temporary alternative work for additional categories of employees, including those with an ADA-qualifying disability, *id.* at 585-86, and those who have an injury or condition that disqualifies them from DOT certification (without regard to whether that disqualification oc-

curred because of an on-the-job injury), *id.* at 590-91. Moreover, in a provision that might well have direct application to Young's circumstance, the collective-bargaining agreement made explicit allowance under its "Maternity and Paternity Leave" policy for "[a] light duty request, certified in writing by a physician, [to] be granted in compliance with state or federal laws, if applicable." *Id.* at 592. Because an employee's eligibility under these policies does not depend on seniority, they do not implicate § 703(h). And, because UPS interpreted and applied those policies in a manner that failed to treat "women affected by pregnancy . . or related medical conditions . the same for all employment-related purposes . . as other persons not so affected but similar in their ability or inability to work," its actions constitute prohibited discrimination as defined by the PDA, 42 U.S.C. § 2000e(k).

As a final matter, even though the record on this issue was not adequately developed because UPS never raised § 703(h) below, the facts that are available indicate that granting equal treatment to Young by virtue of her pregnancy would not cause any interference with the seniority system in any event. Under the various policies that allowed for temporary work assignments, UPS assigned employees with on-the-job injuries and ADA-qualifying disabilities to light duty, as well as some employees to "inside jobs" that do not require heavy lifting. *See* J.A. 397-98 (driver who had a stroke and kidney disease assigned to clerk's job answering phone calls); *id.* at 446-52 (driver with ankle injury acquired outside of the workplace assigned to scan but not lift packages); *id.* at 647 (driver, who lost her driving certification due to high blood pressure, assigned to scan packages, make address corrections,

and apply address labels). Seniority was not a factor when UPS provided these temporary work assignments, and there is no indication in the record that *any* of these assignments resulted in "bumping" or displacement of other more senior employees. Indeed, UPS managers testified that an employee being moved into a light-duty job need not displace another employee because there were *available, open positions* that those employees could perform. *See* Pet Br. at 52; J.A. 260-61. In other words, these managers conceded that the kind of relief Young sought here could have been granted without interfering in any way with the seniority-based reliance interests of other employees.

UPS's belated efforts to invoke Title VII's protections for bona fide seniority systems fail here because they fit neither the letter nor the spirit of § 703(h). To hold otherwise would run a grave risk of entirely "swallowing up Title VII's otherwise broad prohibition[s]." *Cal. Brewers Ass'n*, 444 U.S. at 608. Moreover, given the failure of UPS to raise that issue at the appropriate state of the litigation — thereby ensuring that the issue lacks the necessary factual development —such a holding would be particularly unjustified. Accordingly, this Court should reject UPS's arguments under § 703(h).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
CHAKA DONALDSON
National Education Association
1201 16th Street, N.W.
Washington, D.C. 20036
(202) 822-7035

JUDITH A. SCOTT
NICOLE G. BERNER
JENNIFER L. HUNTER
Service Employees
International Union
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 730-7455

WILLIAM LURYE
PAULA J. CAIRA
American Federation of State, County
and Municipal Employees, AFL-CIO
1625 L Street, N.W.
Washington, D.C. 20036
(202) 429-1293

NICHOLAS W. CLARK
United Food and Commercial
Workers International Union,
AFL-CIO
1775 K Street, N.W.
Washington, D.C. 20006
(202) 223-3111

DAVID STROM
American Federation of Teachers,
AFL-CIO
555 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 393-7472

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* 23 PRO-LIFE ORGANIZATIONS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF PETITIONER PEGGY YOUNG

THOMAS C. BERG
TERESA S. COLLETT
UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403

OVIDE M. LAMONTAGNE
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
655 15th St. NW, Suite 410
Washington, DC 20005

CARRIE SEVERINO
Counsel of Record
JONATHAN KEIM
JUDICIAL EDUCATION PROJECT
722 12th St. NW
Fourth Floor
Washington, D.C. 20005
(571) 357-3134
carrie@judicialnetwork.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici support the goals of the Pregnancy Discrimination Act (PDA) to prevent discrimination against pregnant mothers and to reduce pressure on women in the workforce to have an abortion. Economic pressure is a significant factor in many women's decision to choose abortion over childbirth. Protecting the ability to work can increase true freedom for women, promote the common good, and protect the most vulnerable among us. The PDA protects the unborn child as well as the working mother who faces economic and other difficulties in bearing and raising the child.

When Congress debated the bills that became the PDA, Congress heard testimony from medical experts about the impact of employment on pregnant women and their unborn children. The PDA's supporters included members of Congress who were concerned about the possibility that women would be forced to choose between their jobs and their unborn children. As when the PDA was passed, amici pro-life organizations support an interpretation of the PDA that gives pregnant women meaningful protection from discrimination.

All Our Lives is a nonprofit organization whose

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[1] Counsel for both parties have submitted blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

approach to the abortion issue is informed by both the reproductive justice movement and the consistent life ethic. All Our Lives recognizes the many social and economic factors that place unjust pressure on women to have abortions. Therefore, its mission is to protect life by working for policies that serve the needs of both women and children. These policies include but are not limited to: ending sexual violence and coercion; making safe, effective family planning available to all, as well as prenatal, delivery, and postnatal health care; providing support to impoverished families; and ensuring that schools and workplaces meet the needs of pregnant women and parents.

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of 2,500 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College of Obstetricians & Gynecologists (ACOG) for 40 years, from 1973 until 2013, until ACOG discontinued the designation of "special interest group." AAPLOG is concerned about the potential long-term adverse consequences of abortion on a woman's future health and continues to explore data from around the world regarding abortion-associated complications in order to provide a realistic appreciation of abortion-related health risks.

American Life League is the largest grassroots Catholic pro-life education organization in the United States.

Anglicans for Life (AFL) educates, equips and engages the Anglican Church in fulfilling Scripture's mandate to protect the vulnerable, defend the

fatherless, and plead for the widow. In the U.S. culture, today's widow is the single mother, seeking to provide for her and her family. Pregnancy discrimination hinders a woman's reproductive rights and sends the message that motherhood is not worthy of equal protection under the law. AFL believes the woman and baby both deserve protection during pregnancy.

Bethany Christian Services serves approximately 9000 women per year who have an unintended pregnancy. Many of these women face financial challenges. Many of these women have children whom they support. Bethany Christian Services believes the PDA provides important protections for these women to continue their employment to support their children and families.

Birthmother Ministries is dedicated to providing nonjudgmental assistance to any woman facing an unplanned pregnancy. Birthmother Ministries envisions the Christian community collaborating to love, serve, and support those who face an unplanned pregnancy, working together for the day when human life is universally valued, the need for abortion is eradicated, and all children are welcomed into God's family.

The Catholic Medical Association is a physician-led community of healthcare professionals that informs, organizes, and inspires its members to uphold the principles of the Catholic faith in the science and practice of medicine. Physician members commit to serve the human person who is created by God and to promote healthful policies respectful of life and the dignity and nature of the human person. The

association has an interest in protecting pregnant women from the economic coercion that exists when women must choose between their economic security and the lives of their unborn children.

The Christian Legal Society (CLS), founded in 1961, is an association of Christian attorneys, law students, and law professors, with chapters in nearly every state and approximately 90 public and private law schools. Since 1975, CLS's legal advocacy division, the Center for Law and Religious Freedom, has worked to protect the sanctity of human life in the courts, legislatures, and public square.

Christian Adoption Services, the Adoption Practice Section of the Christian Legal Society, is a collection of Christian adoption lawyers from across the country, dedicated to advocating adoption as a preferable alternative to abortion for those faced with an unplanned pregnancy. Christian Adoption Services affirms that human life is a gift from God, begins at conception, deserves respect, and is worthy of protection, and that adoption is an honorable, selfless and loving means of protecting life.

Concerned Women for America (CWA) is the largest public policy women's organization in the United States, with 500,000 members throughout all 50 states. Through its grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America's health and welfare. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. For over 30 years, CWA has actively promoted legislation,

education, and policymaking consistent with its philosophy, lending a voice to conservative women in the culture, the legislatures, and the courts.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. DFLA believes that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate DFLA's opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. DFLA shares the Democratic Party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

The Ethics & Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, freedom of speech, religious freedom, marriage and family, and ethics. Southern Baptists have a long-standing concern about the treatment of the unborn and policies that affect them and their families.

Feminists For Nonviolent Choices is a

nonpartisan, nonsectarian organization that seeks to return to the grassroots of pro-life feminism. In the tradition of early American feminists, such as Susan B. Anthony and Elizabeth Cady Stanton, Feminists For Nonviolent Choices operates from the core ideals of justice, nondiscrimination and nonviolence. Feminists for Nonviolent Choices is an active voice for a consistent life ethic through our education, advocacy and outreach efforts, especially on college campuses. Feminists For Nonviolent Choices aims to promote a culture in which women can choose life from conception to natural death.

Heartbeat International, Inc. is the world's largest nonprofit organization which has the specific mission to serve, train and educate its over 1800 affiliates which collectively work directly with the hundreds of thousands of pregnant women whose pregnancies are unexpected or otherwise difficult. Heartbeat's affiliates assist by providing pregnant women with material aid, medical services and resources, housing, education opportunities and emotional support.

Law of Life Project (LOLP) is a public interest legal organization dedicated to legally defending the right to life and dignity of the human being from biological conception until natural death in all matters worldwide where such a defense is required. LOLP believes that a woman's dignity is compromised when her ability to choose life for her unborn child is put at odds with her ability to provide for it economically because of pregnancy discrimination in her workplace. LOLP has litigated cases and filed *amicus curiae* briefs in numerous courts around the world, including this Court.

Life Legal Defense Foundation (LLDF) is a California non-profit public interest organization that provides legal assistance to encourage and enable every woman to choose life for her unborn child. LLDF believes the Pregnancy Discrimination Act should be enforced in the manner that reflects the original intent of Congress – relieving financial strain and other types of pressure that might impel a woman to choose abortion when in actuality she desires to carry her pregnancy to term.

The March for Life Education and Defense Fund exists to build a culture of life and bring an end to abortion in America through grassroots and education efforts, most notably in the annual March for Life.

The National Association of Evangelicals (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and that duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

The National Institute of Family and Life Advocates (NIFLA) is a national legal network of more than 1,300 pregnancy resource centers (PRCs), which provide support services and abortion alternatives to mothers contemplating abortion. Of its network, nearly 1,000 PRCs operate as licensed medical clinics,

providing ultrasound confirmation of pregnancy and other medical services to their clients/patients.

The mission of Students for Life of America is to create a culture where those most affected by abortion are empowered and equipped to recruit their peers to join our human rights movement, save lives on the front lines, lead local and national initiatives, and provide tangible resources while supporting those facing an unplanned pregnancy. Students for Life is a resource for and represents more than 838 pro-life student groups at the high school, college, med school and law school levels. SFLA is the only pro-life organization in the nation that works exclusively with young people.

In the spirit of the original suffragettes, Susan B. Anthony List works for the election of candidates who champion life and oppose abortion. Its members share the conviction of Alice Paul, author of the 1923 Equal Rights Amendment, that "Abortion is the ultimate exploitation of women."

University Faculty for Life is an association of hundreds of colleges and university professors who affirm the value of each human life from inception to natural death. Careful and unbiased review of all publicly available data reveals that economic concerns motivate many pregnant women to obtain abortions. Members of University Faculty for Life believe no woman should ever be forced to choose between her unborn child and her job.

The University of St. Thomas Pro-Life Center seeks to promote an end to abortion and stop the drive toward euthanasia through public education, curricular initiatives, and litigation. The center trains

students to work with lawyers and policy makers in the development and defense of laws recognizing the inviolable right to life of every innocent human being.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. In pursuit of these constitutional principles, JEP has filed *amicus curiae* briefs in numerous cases before the federal courts of appeals and the Supreme Court.

SUMMARY OF ARGUMENT

Before Congress passed the Pregnancy Discrimination Act (PDA) in 1978, pregnancy was given no special protection under federal antidiscrimination law. For example, employers could treat pregnancy like a disabling disease and fire any employee who became pregnant against the wishes of the employer. *See General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). But with the PDA, Congress broadened Title VII's definition of sex discrimination to encompass discrimination based on "pregnancy, childbirth, or related medical conditions[.]" Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (Oct. 31, 1978), *codified at* 42 U.S.C. § 2000e(k) (as

amended).

The PDA also states that employers must provide pregnant women with the same accommodations that they provide to other employees who have the similar ability or inability to work. This language is not extraneous surplusage; rather, it is a substantive component of the relief that Congress provided in the PDA. Employers may only consider the pregnant woman's ability or inability to work when determining how to accommodate her condition.

The Court of Appeals erroneously held that the PDA allows employers to treat pregnant women as poorly as they treat their least-accommodated workers rather than requiring them to treat pregnant women as well as they treat their best-accommodated workers. This conclusion is not only at odds with the text and structure of the PDA, but it blocks the PDA from addressing the very problem that Congress sought to solve, that is, to protect women from economic pressure to abort their children and to safeguard their fundamental right to procreate and bring up children. The Court of Appeals was wrong to conclude that Congress's attempt to protect these fundamental rights amounted to "preferential treatment." *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013).

ARGUMENT

I. ON ITS FACE, THE PREGNANCY DISCRIMINATION ACT REQUIRES EMPLOYERS TO PROVIDE PREGNANT WOMEN THE SAME ACCOMMODATIONS IT AFFORDS TO OTHER EMPLOYEES WITH

SIMILAR ABILITY OR INABILITY TO WORK.

The Court of Appeals erroneously held that UPS's policy of accommodating three classes of non-pregnant employees was irrelevant to whether UPS had unlawfully discriminated against Ms. Young for being pregnant when she was denied the same accommodation. *Young*, 707 F.3d at 451. Specifically, the court held that employers can deny accommodations to their pregnant employees so long as no employees with "off the job" injuries are also denied that accommodation. 707 F.3d at 448-49. In effect, the Court of Appeals held that employers only violate the PDA if pregnant women are the *only* group denied an accommodation or benefit. *See id.* at 446 (employers need not accommodate pregnant workers unless a comparable accommodation "was available to the universe—male and female—of nonpregnant employees.").

This holding was legal error because it rendered parts of the PDA superfluous. This Court has previously held that the second clause of the PDA, which mandates equal accommodation of pregnant women, provides substantive protections that are independent of the PDA's anti-targeting first clause. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 204-05 (1991); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987). The Court of Appeals also erred by holding that an employer can refuse to accommodate a pregnant woman's work limitations by reference to factors other than her pregnancy, even though the statute permits

only a single factor employers may consider: the woman's ability or inability to work.

A. The language at issue is not surplusage; it creates a distinct requirement of equal accommodation.

The first sentence of the PDA amends Title VII of the Civil Rights Act of 1964, providing that:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; *and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work*[.]

42 U.S.C. § 2000e(k) (emphasis added). The first clause, by declaring pregnancy discrimination a form of sex discrimination, already prohibits employer policies that single out or target pregnancy (a sex classification) for uniquely disfavored treatment. By holding that the second (italicized) clause of the sentence also merely prohibits an employer from singling out pregnancy for disfavored treatment, the Court of Appeals rendered that second clause superfluous. That result is at odds with the general principle of statutory interpretation that counsels "reluctan[ce] to treat statutory terms as surplusage in any setting[.]" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001); *see also, e.g., Marx v. Gen. Revenue Corp.*, 133 S.Ct. 1166, 1178 (2013).

Indeed, this Court has explicitly construed the second clause of the PDA as having independent meaning and not as merely a restatement of the first clause. *Johnson Controls, Inc.*, 499 U.S. at 204-05 (applying second clause and criticizing the dissent for "ignoring the second clause of the Act" and "read[ing] the second clause out of the Act"). In addition, the most natural reading of the statute's use of the word "and" to separate the two clauses suggests that the clauses are cumulative, with the second clause carrying its own independent meaning.

Some combination of anti-discrimination and accommodation requirements is quite ordinary in civil rights law. Indeed, Title VII's substantive requirement that employers accommodate their employees' religion is, like the PDA, found in the definitional section immediately before the clause at issue in this case. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."). Likewise, the Americans with Disabilities Act (ADA) provides both that individuals must not be denied work based on a qualifying disability and that employers must make reasonable accommodations for the limitations of disabled employees. *See* 42 U.S.C. § 12112(a), (b)(5). The two clauses of the PDA's first sentence are not some textual anomaly, but rather harmonize perfectly to achieve the same interrelated goals as other civil rights statutes.

B. The PDA excludes any factor other than the person's "ability or inability to work" from the determination of whether pregnancy must receive the same accommodation as other conditions.

The PDA requires that pregnant workers "shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work[.]" 42 U.S.C. § 2000e(k). The plain language thus forbids an employer to distinguish accommodations for a pregnant worker from those provided to other workers based on any factor besides their respective ability or inability to work. As the Sixth Circuit has correctly put it: "While Title VII generally requires that a plaintiff demonstrate that [an] employee who received more favorable treatment[,]" such as light-duty, "be similarly situated 'in all respects,' the PDA requires only that the employee be similar in his or her 'ability or inability to work.'" *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (internal citation omitted) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).

The legislative history confirms the plain meaning of the text. In the words of the House committee report, the PDA "specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work." H.R. Rep. No. 95-948, at 3 (1978), *reprinted in* Staff of S. Comm. On Labor and Human Resources, 95th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, Public Law 95-

555 149 (Comm. Print 1979). Likewise, the Senate report states that "the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees." S. Rep. No. 95-331, at 4 (1977), *reprinted in* Staff of S. Comm. On Labor and Human Resources, 95th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, Public Law 95-555 41 (Comm. Print 1979).

Thus, for example, an employer may not accommodate an employee whose need for light duty stems from an "on the job" injury, but then deny accommodation to an employee whose similar need for light duty stems from pregnancy. Nor may an employer accommodate employees who cannot do heavy lifting for a specified list of medical conditions–as UPS does for conditions rendering drivers ineligible for DOT certification or for those covered by the ADA–but refuse to accommodate workers who have those same lifting limitations because they are pregnant. Those impermissible distinctions rest on the *source* or *nature* of the workers' conditions rather than the *extent* of their ability to work. To hold otherwise would be to disregard the second clause's explicit language—the standard it "specifically defines." H.R. Rep. No. 95-948, at 3 (1978).

The Court of Appeals, however, simply balked at following the language of the second clause. It accepted UPS's classification of pregnancy as an "off the job" condition and held that this arbitrary distinction meant UPS had not discriminated against pregnancy by accommodating "on the job" injuries and

not pregnancy. *Young*, 707 F.3d at 448-49. But this irrelevant classification of pregnancy as "off the job" distinguishes the accommodated injuries from pregnancy on the basis of their *source*—on or off the job—and not their effect on the employee's *ability* to work, which is what the PDA mandates. Likewise, by refusing a needed transfer or light-duty assignment when a driver was pregnant but granting it when the driver lost his DOT license, UPS treated Ms. Young's pregnancy differently on the basis of the *source* and *nature* of her condition, not the difference in her relative ability to work. Under the plain language of the second clause, these distinctions are impermissible.

II. THE COURT OF APPEALS ERRED BY COMPARING PREGNANT WORKERS WITH THOSE WHO WERE REFUSED ACCOMMODATIONS RATHER THAN WITH THOSE WHO RECEIVED ACCOMMODATIONS.

The Court of Appeals adopted a cramped reading of the PDA that, rather than maximally accommodating pregnant women, sought to relegate their accommodations to the lowest possible level. This runs contrary to the very purpose of the statute and the well-recognized status of childbearing as a fundamental right deserving of the highest protection.

The second clause of 42 U.S.C. § 2000e(k) clearly requires that pregnant employees be treated the same as employees who have a similar ability to work. But the group of non-pregnant employees who were similarly limited in their work in this case included

both individuals who were ultimately accommodated–those with "on the job" injuries, for example–and those who were not accommodated–those with "off the job" injuries or conditions unrelated to DOT certification or ADA qualifications.

The Court of Appeals was faced with two possible options. It could have read the statute to say that, whenever an employer offers an accommodation to someone with the same ability to work as a pregnant woman, they must accommodate the pregnant woman as well. Instead, it chose the path of least protection, reading the statute as effectively saying to employers: as long as you discriminate against some people based on their relative inability to work, you can give the same treatment to all comparably-situated pregnant women. It means that as long as an employer refuses an accommodation for at least one non-pregnant worker, he can refuse the pregnant woman as well.

In essence, the Court of Appeals held that an employer does not discriminate against a pregnant employee unless it singles out pregnancy for the worst possible non-accommodation. Under this holding, as one other court of appeals has revealingly put it, "[e]mployers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees," *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (Posner, J.)—that is, as badly as they treat *any* non-pregnant employee. Although the Court of Appeals here objected that pregnancy should not have "'most favored nation' status," *Young*, 707 F.3d at 446, it essentially held that employers can consign pregnancy to "least favored nation" status simply by classifying pregnancy with the least-accommodated category of conditions.

But this is not only "least favored nation" status; it is "race to the bottom" status. By relegating pregnancy to the lowest possible status, the Court of Appeals adopted an approach that would allow employers to "consistently employ discriminatory criteria as long as they were careful to draw their discriminatory lines broadly enough to include members of a nonprotected class." *E.E.O.C. v. Bd. of Governors of State Colls & Univs*, 957 F.2d 424, 431 (7th Cir. 1992); *accord NAACP v. Harrison*, 940 F.2d 792 (3d Cir. 1991) (Title VII disparate impact action); *United States v. Town of Cicero*, 786 F.2d 331 (7th Cir. 1986) (Title VII disparate impact action). That interpretation gives employers the power to simply wave away the PDA's requirement of equal accommodation.

This was error. As a textual matter, the Court of Appeals' interpretation is incorrect because it renders the second clause of 42 U.S.C. § 2000e(k) superfluous, as we argue above. Furthermore, faced with these two potential interpretations of the PDA, the Court of Appeals adopted the interpretation that least advances the clear purpose of the statute.

In the PDA, Congress expressly recognized how important a role pregnancy plays in women's lives. It follows that pregnancy should be treated comparably to conditions that the employer treats well, not conditions the employer treats poorly. There is also congressional commentary going directly to this question. Senator Jacob Javits, one of the bill's sponsors, noted when discussing the PDA, "where other employees who face temporary periods of disability do not have to face the same loss, it is especially important that we not ask a potential mother to undergo severe disadvantages in order to

bring another life into the world." 123 Cong. Rec. 29,387 (Sept. 15, 1977) (statement of Sen. Jacob Javits). This interpretation is the opposite of that adopted by the Court of Appeals because it assumes the PDA will be triggered whenever some other employee *is* accommodated, not when *no* other employee is accommodated.

A. Congress sought to protect women from economic pressure to abort their children because of pregnancy discrimination.

As this Court has noted, when Congress enacted the PDA, it "had before it extensive evidence of discrimination *against* pregnancy" and the problems this created for working women. *Guerra*, 479 U.S. at 285 (emphasis in original). "The Reports, debates, and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers." *Id.* at 285-86. Congress's decision to pass the PDA in the first instance only makes sense if pregnancy is a crucial aspect of human existence, one that warrants *at least as much* protection as other significant interests.

Congress was especially concerned about the ways that economic pressure weighs against decisions to bear children and have a family, even including economic pressure to terminate a pregnancy. Specifically, many members of Congress supporting the PDA were concerned that women should not be forced by economic vulnerability into having abortions, and they saw reducing such pressures as

one of the purposes of the PDA. *See, e.g.*, 123 Cong. Rec. 10,582 (Apr. 5, 1977) (statement of Rep. Hawkins, chief House sponsor: "Further, some mothers, unable to afford the loss of income [caused by discrimination], may be discouraged from carrying their pregnancy to term."); 123 Cong. Rec. 29,657 (Sept. 16, 1977) (statement of Sen. Williams, chief Senate sponsor: "One of our basic purposes in introducing this bill is to prevent the tragedy of needless, and unwanted abortions forced upon a woman because she cannot afford to leave her job without pay to carry out the full term of her pregnancy."); 123 Cong. Rec. 29,635 (Sept. 16, 1977) (statement of Sen. Biden: "In a very real-world-sense what this denial of freedom [because of discrimination] means is that many women, especially low income women, may be discouraged from carrying their pregnancy to term. To put it bluntly they will be encouraged to choose abortion as a means of surviving economically.")

In short, the PDA reflected the common ground shared by proponents and opponents of abortion, namely, that women have a fundamental human right to have children that should not be limited by economic pressure resulting from workplace discrimination. Without the protection of the PDA, women faced with a conflict between the need to work and the fundamental right to bear a child were forced to give up one or the other fundamental right. Even today, nearly 40 years after the PDA's passage, many women continue to face implicit pressure from employers to abort their children. *See* U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance: Pregnancy Discrimination and Related Issues* (July

14, 2014), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited Sept. 9, 2014).

Moreover, economic pressures on childbearing have only increased since the PDA was passed in 1978. Two years after the passage of the PDA, less than 20 percent of American children were born to unmarried women, but by 2013, that percentage had doubled to 40.6 percent. U.S. Census, 2011 Statistical Abstract, tbl.1334, https://www.census.gov/compendia/statab/2011/tables/11s1336.pdf (last visited Sept. 9, 2014); Brady E. Hamilton, et al., *Births: Preliminary Data for 2013*, 63 Nat'l Vital Stat. Reps. 2, 14 tbl.6 (May 29, 2014), http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_02.pdf (last visited Sept. 9, 2014). Simultaneously, the participation of women with children under the age of eighteen in the national labor force increased from 56.6 percent in 1980 to almost 70% in 2013. Howard V. Hayghe, *Developments In Women's Labor Force Participation*, Monthly Labor Rev., Sept. 1997, at 42, *available at* http://www.bls.gov/mlr/1997/09/art6full.pdf (last accessed Sept. 9, 2014); U.S. Dept. of Labor, Bureau of Labor Stat., Emp't Characteristics of Families–2013 (Apr. 25, 2014), http://www.bls.gov/news.release/famee.nr0.htm (last visited Sept. 9, 2014).

More likely than not, today a pregnant woman will be either working or looking for work. In 2012, 62 percent of women with a birth in the previous twelve months were in the labor force. Lindsay M. Monte & Renee R. Ellis, U.S. Census Bureau, *Fertility of Women in the United States: 2012, Population Characteristics* 10 tbl.3, 12 (July 2014), http://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-575.pdf (last visited Sept.

9, 2014). Women working full-time while pregnant typically work into the last month of their pregnancies. Lynda Laughlin, U.S. Census Bureau, Maternity Leave and Employment Patterns: 2006–2008, at 6, 8 (Oct. 2011), http://www.census.gov/prod/2011pubs/p70-128.pdf (last visited Sept. 9, 2014) (87 percent of full-time pregnant employees work in the last month before giving birth). Almost all working women who give birth will continue or return to work during the first year of their children's lives. *Id.* at 14; U.S. Department of Labor, Bureau of Labor Statistics, Employment Characteristics of Families–2013 (Apr. 25, 2014), *available at* http://www.bls.gov/news.release/famee.nr0.htm (last visited Sept. 9, 2014) (57 percent of all mothers with infants under a year old were working or looking for work in 2013).

Many of these women are either the sole or primary source of income for their families. Forty percent of all households with children under the age of 18 include mothers who are either the sole or primary source of income for the family, up from just 11% in 1960. Wendy Wang *et al.*, Pew Research Center, *Breadwinner Moms* 1 (2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf (last accessed Sept. 9, 2014). The PDA was explicitly designed to protect pregnant women from the vulnerabilities that may arise from their economic position.

B. Congress understood that it was protecting women's fundamental rights to marry, establish a home, and

bring up children from pregnancy discrimination.

Faced with the pervasive problem of pregnancy discrimination, Congress sought to protect women's fundamental rights "to marry, establish a home, and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), *quoted in Griswold v. Connecticut*, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring); *see also Zablocki v. Redhail*, 434 U.S. 374, 385-86 (1978) (Marshall, J.) (discussing fundamental rights to "procreation, childbirth, child rearing, and family relationships."). Recognitions of this vital interest pervade the legislative history. The PDA's chief Senate sponsor, Sen. Harrison Williams, introduced the bill on the floor by explaining: "The entire thrust behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to *full participation in family life*." 123 Cong. Rec. 29,658 (Sept. 16, 1977) (statement of Sen. Williams) (emphasis added). This Court quoted that statement in *Guerra* and affirmed it as an accurate indicator of the PDA's basic purposes. *See Guerra*, 479 U.S. at 288-89. "[F]ull participation in family life," of course, includes the fundamental right to bear children while also "participat[ing] fully and equally in the workforce."[2] Congress's recognition of these

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[2] *See also, e.g., Leg. To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing Before the Subcomm. On Emp't Opp. of the H. Comm. On Ed. And Labor*, 95th Cong. 19-20 (1977) (prepared statement of Prof. Wendy Williams); *Discrimination*

interests confirms that it meant pregnancy to be treated like other conditions that Congress deems important enough to receive accommodation, not like interests that are denied accommodation.

The legislative record also contains several references to the case that persuaded Congress to pass the PDA, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Supreme Court interpreted Title VII sex discrimination as not covering pregnancy discrimination. The PDA was designed to supersede that holding, and supporters of the bill cited the reasoning by the district court in *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va. 1974). Although GE had contended that it could treat pregnancy differently from injuries and disabilities for which it provided benefits because pregnancy was voluntary, the district court emphatically rejected that argument, emphasizing the centrality of a woman's interest in bearing a child while being able to work:

> [U]nder G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the Court.

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on the Basis of Pregnancy: Hearing on S. 995 Before the Subcomm. On Labor of the S. Comm. On Human Resources, 95th Cong. 115, 137 (1977) (testimony of Wendy W. Williams, Assistant Professor, Georgetown University Law Center). ("A necessary side effect of these policies [denying pregnancy protections] is the burden placed upon the woman's choice to bear a child, a right the Supreme Court has recognized to be of constitutional magnitude.").

> While it is true that women may, under certain conditions, resort to an abortion, it cannot be reasonably argued that Congress in its enactment of Title VII ever intended that an intended beneficiary of that Act forego a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of the benefits of employment free of discrimination.

Gilbert, 375 F. Supp. at 381-82 (footnotes and citations omitted); *see also, e.g.*, *Leg. To Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing Before the Subcomm. On Emp't Opp. of the H. Comm. On Ed. And Labor*, 95th Cong. 19 (1977) (testimony of Prof. Wendy Williams); *Discrimination on the Basis of Pregnancy: Hearing on S. 995 Before the Subcomm. On Labor of the S. Comm. On Human Resources*, 95th Cong. 115, 137 (1977) (testimony of Wendy W. Williams, Assistant Professor, Georgetown University Law Center); *id.* at 438 (written testimony of Jacqueline M. Nolan-Haley, representing American Citizens Concerned for Life).

However, as this Court has recognized, Congress understood that it needed to do more than expressly acknowledge pregnancy discrimination as sex discrimination. Congress included the second clause of § 2000e(k) to "overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied." *Guerra*, 479 U.S. at 285 (emphasis added). Congress recognized what the legislative history of the PDA amply demonstrates: pregnancy is a unique condition, posing uniquely confusing considerations and analogies, particularly in the context of employment discrimination. For purposes of

the PDA, the relevant unique features are: (1) pregnancy only affects women; (2) pregnancy has historically posed significant barriers to equal treatment of women in the workforce; (3) these barriers implicate the fundamental right of a woman to bear a child. These three features justify the PDA's recognition that discrimination because of pregnancy is discrimination on the basis of sex entitled to the protections of Title VII.

Other unique features of pregnancy, however, can make the practical implementation of these protections confusing. The complicated analysis of pregnancy's status as a disability under the ADA, or a normal aspect of the human condition that sometimes presents temporarily disabling complications, is one example. *See* Joan C. Williams, *et al.*, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97 (2013). Congress included the second clause of § 2000e(k) in an attempt to clarify some of this confusion, by telling employers precisely what they should do to avoid discriminating against women on the basis of pregnancy. Employers should treat women affected by pregnancy "the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). With this explanatory language, Congress explicitly acknowledged the discriminatory effect on women of not according pregnancy-related impairments of an employee's ability to work the same accommodations provided for other similar impairments.

The second clause of § 2000e(k) illustrates precisely how an employer can ensure that its

workplace accommodations will not discriminate against women by disfavoring pregnancy with policies structured around a male-centered "ideal worker" paradigm. The PDA does not require an employer like UPS to provide accommodations based *solely* on pregnancy-related circumstances. However, if an employer offers accommodations to employees based on other circumstances, it must ensure that the other circumstances do not reflect assumptions about legitimate reasons for accommodations that accord pregnancy less legitimacy. The only relevant consideration permitted under the second clause of § 2000e(k) is whether the pregnant woman's ability to work is comparable to the ability to work of the other accommodated worker. This special treatment of pregnancy is mandated by the PDA because pregnancy has historically posed such significant barriers to the equal treatment of women in the workplace, and because these barriers implicate the fundamental right of a women to bear a child in a way that cannot ever affect a man.

C. Requiring accommodations for pregnant women whenever they are given for those with similar ability to work does not imply impermissible "preferential treatment" for pregnancy.

The Court of Appeals was wrong to conclude that the plain meaning of the statute would create impermissible "preferential treatment" for pregnant workers claiming light-duty work or other accommodations. *See Young*, 707 F.3d at 448. Plainly, the PDA is violated only by *discrimination against*

pregnancy; if the employer makes no accommodations whatsoever for employees similar in their ability to work, the PDA is inapplicable. But as we have emphasized, this case requires a determination about the meaning of pregnancy discrimination itself: that is, whether employers must treat pregnant women as well as the employees who receive the greatest accommodations, or whether they may treat women as badly as non-pregnant employees who receive the fewest accommodations. The answer to that question is clear in light of Congress's recognition of the importance of the interest in being able to have children and also work: pregnancy should be treated the same as conditions that are important enough to accommodate.

Moreover, treating pregnancy the same as other accommodated conditions is necessary because—as the PDA recognizes—the distinctive features of pregnancy itself can lead to distinctive barriers to women's equal participation in the workplace. As the district court in *Gilbert* observed, "[P]arenthood is common to both sexes, yet under G.E.'s policy [denying benefits for pregnancy], it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state." *Gilbert*, 375 F. Supp. at 381. As discussed *supra* at 22-27, barriers caused by refusals to accommodate pregnancy implicate a women's fundamental right to bear a child in a way that cannot ever affect a man. *See Gilbert*, 375 F. Supp. at 381 (concluding that the effect on women "is undisputed and inextricably sex[-]linked"). Congress responded to this distinctive effect on women, not by ordering accommodation as an

absolute matter, but by ordering it when the employer accommodates the conditions of other employees who are similar in their ability or inability to work.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

THOMAS C. BERG
TERESA S. COLLETT
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403

OVIDE M. LAMONTAGNE
CLARKE D. FORSYTHE
AMERICANS UNITED FOR LIFE
655 15th St. NW, Suite 410
Washington, DC 20005

CARRIE SEVERINO
Counsel of Record
JONATHAN KEIM
JUDICIAL EDUCATION PROJECT
722 12th St. NW
Fourth Floor
Washington, D.C. 20005
(571) 357-3134
carrie@judicialnetwork.com

Counsel for Amici Curiae

Dated: September 11, 2014

AMICUS CURIAE BRIEF

No. 12-1226

IN THE

Supreme Court of the United States

PEGGY YOUNG, *Petitioner*

v.

UNITED PARCEL SERVICE, INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of U.S. Chamber of Commerce as Amicus Curiae in Support of Respondent

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Ave., 22nd Floor
New York, NY 10010

LILY FU CLAFFEE
KATE COMERFORD TODD
STEVEN P. LEHOTSKY
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LORI ALVINO MCGILL
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN LLP
777 6th Street, NW
Washington, DC 20001
lorialvinomcgill@quinnemanuel.com
(202) 538-8000

October 31, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts, including this Court. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members are subject to Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-2(a)(1) ("PDA"). Petitioner's interpretation of the PDA would distort Title VII and result in an unprecedented, unbounded, and legally unsupported theory of "intentional" discrimination that in fact requires no showing of intent to discriminate.

Many of the Chamber's members, and UPS itself, provide greater accommodations for pregnant employees than required by Title VII. These employers

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[1] All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person other than amicus curiae, its counsel, and its members, made any monetary contribution intended to fund the preparation or submission of this brief.

have decided—for a variety of reasons—to offer pregnant employees more than what federal law compels them to provide.

This case does not call for the Court to resolve the optimal manner in which employers should accommodate pregnant employees. Nor is it to decide the minimum protections for pregnant employees required by Title VII, or to resolve any claim of disparate impact discrimination based on pregnancy under an employer's facially-neutral policy.

Rather, Petitioner and her amici ask this Court to stretch core discrimination-law principles far beyond previously settled bounds, and to subject employers to increased penalties for supposed intentional discrimination without corresponding proof. The Chamber's members have a strong interest in the proper resolution of that issue.

SUMMARY OF ARGUMENT

This case presents a choice between two markedly different approaches to interpreting the second clause of 42 U.S.C. § 2000e(k), which provides that pregnant employees shall be treated the same as other employees "similar in their ability or inability to work." Petitioner argues that, in clarifying through the PDA what it means to discriminate "because of sex," this clause created an entirely new cause of action based on an employer's failure to accommodate a pregnant employee who cannot perform the ordinary tasks associated with her job. The Government agrees. Respondent maintains that this clause simply clarified that an employer must not

consider pregnancy in making employment decisions and, if it does, it is subject to the pre-existing causes of action previously found in Title VII.

The Chamber supports Respondent's arguments, but will not belabor them. Rather, this brief expands on the structural support for Respondent's reading of the statute and the practical reasons why Respondent's reading is correct.

The structure of Title VII makes clear that the statute recognizes two distinct types of actionable discrimination based on pregnancy. Where an employer *intentionally* burdens an employee because she is pregnant, she can raise a disparate treatment claim. Where an employer has applied a facially neutral policy that *unintentionally* burdens a pregnant employee, the employee can assert that the policy created an unlawful disparate impact. These two theories are analytically distinct, require different forms of proof, allow for different defenses, and provide different remedies.

The position advanced by Petitioner and her amici (including the Government) distorts this statutory structure, and would create the unprecedented anomaly of an "intentional" discrimination claim that requires no showing of discriminatory intent. The sole argument offered by Petitioner and the Government for this remarkable conclusion, while repackaged in various forms, inevitably relies on ignoring the statutory context and assuming that the PDA creates a freestanding cause of action for failure to accommodate pregnancy. It does not.

Reading § 2000e(k) to create this contradiction in terms—a disparate treatment cause of action with no showing of intentional discrimination—would lead to untenable and implausible results. Under Petitioner's reading, Title VII would prevent businesses from giving unique benefits to employees injured in service of their employer, and would prohibit neutral seniority policies. It also would read Title VII as outlawing scores of other innocuous, commonplace, pregnancy-neutral policies followed by American businesses. These results further confirm that Petitioner's reading misconstrues the operation of Title VII and should be rejected.

More broadly, this case presents a flawed lens through which to draw general conclusions regarding federal legal protections for pregnant employees. In an attempt to create a novel, unbounded, and unsupported theory of intentional discrimination under Title VII, Petitioner has abandoned any disparate impact claim—the most natural claim through which to seek redress for grievances of this type. The Court should be particularly hesitant to create in this case a claim of intentional discrimination that requires no showing of intent to discriminate.

ARGUMENT

I. TITLE VII RECOGNIZES ONLY TWO CAUSES OF ACTION FOR EMPLOYMENT DISCRIMINATION

The structure of Title VII makes clear the untenable nature of Petitioner's approach.

A single provision in Title VII—42 U.S.C. § 2000e–2—gives rise to two distinct theories of liability. It provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(a).

On its face, the prohibition of discrimination "because of" a protected trait most naturally creates a cause of action for disparate treatment—*i.e.*, discrimination that *intentionally* targets a protected trait. *See, e.g., Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

In *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), this Court interpreted this same provision also to create disparate impact liability—*i.e.*, liability where an employer imposes a neutral policy that has an *unintentional* impact on a protected class.

Disparate treatment and disparate impact theories are analytically distinct causes of action that differ in at least four key respects.

First, as its name implies, disparate treatment liability is premised on a finding of intentional discrimination. It requires a showing that a protected trait "actually motivat[ed] the employer's decision." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (citation omitted); *see also Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action.") (internal quotation marks omitted). Intentional discrimination can be shown either by a policy or decision that relies expressly on a protected characteristic, or on a policy or practice that, although ostensibly neutral, operates to single out exclusively members of a protected class, *see, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

"By contrast, disparate-impact claims involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Raytheon Co.*, 540 U.S. at 52. They are a means of proving actionable discrimination where there is not proof of discriminatory intent. Thus, a disparate impact claim stands in stark contrast to a disparate treatment claim; it focuses on the mere presence of a "neutral, generally applicable" policy which by itself, "can, in no way, be said to have been motivated by" a protected trait. *Id.* at 55.

Second, the two types of claims require different types of proof. Because intentional discrimination can sometimes be difficult to prove, this Court has recognized a burden-shifting framework that allows a plaintiff to proceed based solely on a minimal *prima facie* showing of potential discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Although a plaintiff may likewise make use of a burden-shifting framework on a disparate impact claim, the required threshold showing is more substantial. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650-55 (1989) (explaining that even stark racial disparities in employment may not establish a *prima facie* case of disparate impact without careful analysis of the available labor pool).

Third, an employer can rely on various defenses to avoid disparate impact liability, such as the "business necessity" defense or the lack of alternative employment practices. *See* 42 U.S.C. § 2000e–2(k)(1)(A)(i)-(ii). These defenses have been applied only in disparate impact cases. *See, e.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988).

Fourth, a finding of intentional discrimination exposes an employer to compensatory and punitive damages—remedies that are not available in a disparate impact claim. "In an action brought by a complaining party under [Title VII] against a respondent who engaged in unlawful intentional discrimination"—*i.e.*, not an employment practice that is unlawful because of its disparate impact—"the complaining party may recover compensatory and punitive damages." 42 U.S.C. § 1981a(a).

In light of these significant differences, this Court has admonished that "courts must be careful to distinguish between these theories." *Raytheon*, 540 U.S. at 53.

Critically, although 42 U.S.C § 2000e–2 creates causes of action for intentional discrimination and unintentional disparate impact, it does *not* create a cause of action for failure to *accommodate* employees with protected traits. Indeed, there are remedies for only two types of violations of Title VII—"intentional discrimination" and "disparate impact." 42 U.S.C. 1981a(a). There is no prescribed remedy for "failure to accommodate."

When read against this background structure and this Court's construction of the statute, the meaning of § 2000e(k) is clear. As Respondent explains, § 2000e(k) was a reaction to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), a case involving *intentional* discrimination based on pregnancy. Resp. Br. at 29-31. The first clause of § 2000e(k) rejects the specific reasoning in *Gilbert*—that pregnancy does not fall within the protected characteristic of sex. And the second clause "explains the application of th[at] general principle to women employees.'" *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983).[2] Thus, § 2000e(k) di-

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[2] Petitioner (Br. 22-23) and the Government (Br. 15) claim that this reading renders the second clause of § 2000e(k) superfluous. But there is nothing superfluous about a general clause that elaborates and expands upon a more specific clause earlier in the same sentence. In all events, although the second clause of § 2000e(k) of course

rects courts to apply the traditional discrimination claims in § 2000e–2—disparate treatment and disparate impact—to the now-protected trait of pregnancy.

This definitional provision does not alter the structure of discrimination claims found § 2000e–2. This Court has never understood the PDA to make structural changes to Title VII. *See e.g., Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085, n.14 (1983) (Marshall, J., concurring) ("[T]he purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles."). And doing so would be inconsistent with the contemporaneous legislative understanding of the PDA. *See* S. Rep. No. 95-331, at 3-4 (1977) (explaining that the PDA "defines sex discrimination, as proscribed in the existing statute, to include [pregnancy and related medical conditions]; it does not change the application of title VII to sex discrimination *in any other way*") (emphasis added).

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overlaps with the first, that is at least as true under Petitioner's reading—which, if accepted, would cause the second clause to sweep up every case covered by the first clause.

II. PETITIONER'S THEORY DISREGARDS THE STRUCTURE OF TITLE VII AND DISTORTS THE CONCEPT OF DISPARATE TREATMENT

Because there are two, and only two, causes of action created by § 2000e-2—and because Petitioner has abandoned any disparate impact claim—she must necessarily be proceeding on a disparate treatment, *i.e.*, an intentional discrimination theory.

But Petitioner cannot show that Respondent engaged in "intentional" discrimination. Respondent applied a facially neutral policy to Petitioner. That policy had an obvious business purpose. Respondent did *not* apply the policy exclusively to pregnant women so as to be the functional equivalent of a facial classification, *cf. Yick Wo*, 118 US 356. *See* Resp. Br. at 51. And Respondent *did* apply the same policy to the group of non-pregnant employees most similarly situated to Petitioner—employees who were unable to do their jobs due to a condition, injury, or disability acquired while engaged in an activity outside of work. *Id.*

Unable to show discriminatory intent, Petitioner argues (Br. 17) that she need not show any discriminatory animus at all because UPS's facially neutral policy is "on its face" discriminatory.[3] Likewise, the

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[3] Petitioner makes a fallback argument that she may survive summary judgment by showing intentional discrimination indirectly under *McDonnell Douglass*. Yet, as Respondent explains (Br. 52-54), this argument is just another way of phrasing Petitioner's argument that it is

Government (Br. 16) makes the remarkable assertion that a policy that does not mention pregnancy and applies to both pregnant and non-pregnant workers alike is nonetheless "facially discriminatory" if it favorably exempts other non-pregnant workers on grounds unrelated to pregnancy. *See also* U.S. Br. at 15 (arguing that "[a] policy need not explicitly mention pregnancy-related work limitations in order to be facially discriminatory under Title VII").

That cannot be the law. A facially neutral policy, such as the one employed by UPS here, does not become facially discriminatory under the PDA merely because it does not affirmatively extend a privilege to a pregnant employee.

The arguments of both Petitioner and the Government both mistakenly conflate intentional and unintentional discrimination. For example, Petitioner (Br. 32) and the Government (Br. 16) assert that, in deciding whether employees are "similar in their ability or inability to work," a court may not consider the source of a work limitation or compare a pregnant employee to the most analogous subset of non-pregnant employees. They both argue that these factors must be disregarded because the text of § 2000e(k) draws no such distinctions.[4]

"facially" discriminatory to apply a neutral policy that does not affirmatively accommodate pregnancy.

[4] This argument is itself flawed, as it is entirely natural to say that an employee injured on the job, or a veteran injured at war, are not "similarly situated" to an employee who is unable to work due to a condition developed off the

Yet, factors such as the source of the disability, and whether a protected class is treated the same way as similarly situated members outside of the class, are central to the question of whether intentional discrimination has occurred. There are numerous legitimate reasons to distinguish among disabled employees in determining who has priority in receiving a coveted or costly accommodation. *See infra*, Section III. An employer's reliance on one of these neutral factors to grant an accommodation to some non-pregnant employees while denying it to others is thus strong evidence of a non-discriminatory purpose. "[T]he expansion of the concept of 'comparators' to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII." Constance S. Barker, Memorandum, Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014 at * 2 (May 23, 2014).

Petitioner also contends that Respondent's position would prevent the PDA from fulfilling its purpose of overturning *Gilbert*. But *Gilbert* was a case in which the employer both treated pregnancy differently from *all* other analogous conditions and *facially* discriminated on account of pregnancy. *See* 429 U.S. at 127; *see also id.* at 146 (Brennan, J., dissenting).

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job. Indeed, the Government made this same argument in defending the Postal Service against the theory it now supports. Gov't Br., *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996), 1995 WL 17845805, at *26.

See also U.S. Br. at 9 ("Congress enacted the [PDA] to overturn this Court's holding in [*Gilbert*], that an employer's policy of treating pregnancy-related disabilities less favorably than *all* other disabilities did not violate Title VII.") (Emphasis added).

Thus, Respondent's reading leads to precisely the result one would expect following *Gilbert*—*i.e.*, a ban on intentional pregnancy-based discrimination. There is no reason to believe that Congress intended the PDA to sweep up employers who denied accommodations uniformly to both pregnant and non-pregnant employees who developed a disability as a result of non-work activities. Even Justice Stevens' dissent in *Gilbert* concluded that such a scenario would not constitute disparate treatment. 429 U.S. at 161 (Stevens, J., dissenting). Congress legislatively overruled *Gilbert*'s failure to treat classifications affecting pregnancy as classifications affecting "sex" in traditional Title VII cases. But there is nothing to suggest that Congress also intended to create a new, third type of discrimination claim heretofore unrecognized under Title VII.

The argument that Respondent's reading of the PDA would somehow eviscerate the statute rings particularly hollow given that Petitioner has abandoned any disparate impact claim. Whatever the reasons for that tactical decision in this particular case, it should not obscure the fact that, in general, employees who believe they are unlawfully burdened by the application of a facially neutral policy retain the ability to seek redress through a disparate im-

pact claim.[5] Nor should this Court allow a plaintiff who has not established unintentional disparate impact to nonetheless plead intentional disparate treatment based on an unintentional impact on pregnant employees.

III. PETITIONER'S APPROACH WOULD PRODUCE UNTENABLE AND IMPLAUSIBLE PRACTICAL RESULTS

Petitioner's reading of the PDA would not only create a contradiction in terms—an intentional discrimination claim that requires no proof of intentional discrimination—but it would also lead to untenable and implausible practical results.

To justify her proposed rule—that all pregnant employees must be given every privilege that their employer gives to *any* other employee of similar ability, without regard to any other factors—Petitioner insists on reading the "plain text" of § 2000e(k) with-

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[5] Indeed, a disparate impact claim could produce the same result as an accommodation claim in some cases. Where a neutral policy creates an unlawful disparate impact, the *remedy* for that impact would likely be to require an exception to the policy at issue (i.e., an accommodation) when applied to a burdened member of a protected class. *Cf.* Christine Jolls, *Antidiscrimination and Accommodation* 115 Harv. L. Rev. 642, 652-666 (2001) (arguing that disparate impact liability can often be viewed as an accommodation requirement). Of course, Petitioner has not pressed a disparate impact claim, and the only question before the Court is whether she can assert an accommodation claim as a type of disparate treatment.

out any reference to well-established principles of discrimination law codified in Title VII.

But when read without context (as Petitioner does), § 2000e(k) would become untenably broad. On Petitioner's view, the PDA independently commands that:

> women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for *all* employment-related purposes, including receipt of benefits under fringe benefit programs, as [*every*] other person[s] not so affected but similar in their ability *or* inability to work [without regard to the reason for the ability or inability].

Id. (brackets and emphases added).

According to Petitioner, this proposed rule would require total parity between *any* pregnant employee and *every* other employee who has a similar "ability *or* inability" to work—including on matters such as compensation, perks, and assigned tasks. It would also treat as intentionally discriminatory common, beneficial, and pregnancy-neutral policies that have been acknowledged as lawful by both the enactors of the PDA and by this Court. For example, Petitioner's reading of the PDA would make employers potentially liable for giving special solicitude to workers injured on the job or implementing neutral seniority policies.

It is implausible that Congress would have intended any of these outcomes in enacting the PDA. The more plausible reading—that the second clause

of § 2000e(k) is a gloss on the first clause, and must be read fully in context of the structure of Title VII—would avoid the untenable consequences of Petitioner's reading.

A. Although Petitioner candidly acknowledges the impact of her approach on accommodations for on-the-job injuries and seniority systems, she overlooks the unusual outcomes that would follow from applying the same approach to all of § 2000e(k).

For example, suppose a business gave hiring or promotion preferences to veterans of the U.S. military—as the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4335, requires and as thousands of American businesses do. This would violate the PDA under Petitioner's theory, even if the business evenhandedly gave preferences to both pregnant and non-pregnant veterans while denying it for both pregnant and non-pregnant non-veterans. This is because a pregnant non-veteran could claim that she was passed over for promotion in favor of a non-pregnant veteran of similar working ability—*i.e.*, the pregnant non-veteran could claim that she was not "treated the same for all employment-related purposes" as the non-pregnant veteran. The same logic would presumably invalidate—as intentional discrimination—a hiring preference for graduates of a particular university or applicants born in a business-owner's home state.

More implausible still, by viewing the second clause of § 2000e(k) in isolation from the broader context of that provision and the structure of Title VII as a whole, the logic of Petitioner's approach

would compel parity between all pregnant employees and every other employee who has a similar "ability *or* inability" to work. (Emphasis added.) Thus, if all context is ignored and § 2000e(k) is treated as an independent cause of action, a pregnant employee who has no impairment or disability at all would presumably have a claim for intentional discrimination if *any* other employee who was equally able to work received different compensation, perks, or tasks.

Under Petitioner's approach, it also should not matter if the non-pregnant employee actually received *worse* benefits (as all employees "shall be treated the same"). Or that the employer did not even know the plaintiff was pregnant (as no intent is required). Or that the pregnant employee does not *ask* to be treated the same way (as no request for accommodation is required). This cannot be what Congress intended; *i.e.*, Congress could not have intended the second clause of the PDA to create a freestanding cause of action, uninformed by Title VII principles.

B. Under Petitioner's interpretation of the PDA, a business that offered light-duty assignments to workers injured on the job—and to no other workers—would be liable for intentional discrimination, simply because a pregnant worker whose physical limitations do not stem from a work-related injury, but from pregnancy, would not be given the same accommodation.

That is not—and should not be—the law.

Employers may have legitimate obligations to offer special treatment to their employees injured on

the job. These obligations may simply not apply to employees who have off-the-job injuries, off-the-job illnesses, off-the-job disabilities, or pregnancies. Policies accommodating on-the-job injuries are commonplace in the American workforce and should not be condemned as intentional pregnancy discrimination.

Businesses may also have a special *legal* relationship to employees injured on the job. This is largely due to the various workers' compensation laws that govern on-the-job injuries but not injuries or impairments that occur off the job. For example, workers' compensation benefits sometimes depend on whether the employer offers (and the employee accepts) suitable light-duty work. *See* THE LEAVE AND DISABILITY COORDINATION HANDBOOK, ¶243 (Thompson Pub. Group 2013.) Moreover, the workers' compensation acts of many States either require or encourage businesses to offer light-duty positions to such workers. *See, e.g.,* Conn. Gen. Stat. § 31-313; La. Rev. Stat. § 23:1226; Cal. Labor Code § 4658.7; Me. Rev. Stat. Ann. tit. 39-A, §219; Minn. Stat. Ann. § 176.108.

Given this backdrop, it is not surprising that thousands of American businesses give a special preference to their workers injured on the job when it comes to allocating scarce and coveted light-duty work assignments. It would be surprising, however, if the PDA were intended to outlaw pregnancy-neutral policies that favor workers injured in the line of duty.

C. Finally, Petitioner's approach to the PDA also would necessarily lead American businesses to abandon their pregnancy-neutral seniority policies. Under Petitioner's rule, employers would need to ensure that pregnant employees are always given priority over a non-pregnant employee of equal working ability, even if a non-pregnant employee has seniority.

Again, that is not the law. Preferring to adhere to a neutral seniority policy is not proof of intentional pregnancy discrimination. As this Court recognized in *AT&T Corp. v. Hulteen*, under the PDA "[b]enefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are the result of an intention to discriminate." 556 U.S. 701, 709 (2009). More generally, this Court has recognized that "routine application of a bona fide seniority system would not be unlawful under Title VII." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977).

This Court's ruling in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), further illustrates the point. In *Barnett*, an employee with a back injury sought to retain a coveted light-duty mailroom job, but the employer instead gave the job to a more senior non-injured employee, pursuant to its policy of seniority-based job bidding. *Id.* at 394. The employee sued, alleging that the mailroom job was a reasonable accommodation for his back injury and that the company violated the ADA by denying him this accommodation. *Id.* at 394-95. The Supreme Court (with a minor qualification) ruled for the company, holding that a company's interest in doling out light-

duty assignments pursuant to a neutral seniority system will usually "trump" a claim for reasonable accommodation under the ADA. *Barnett*, 535 U.S. at 403-404. In other words, ADA claimants generally may not be prioritized over more senior colleagues just because they are entitled to reasonable accommodation under the ADA. Of course, the ADA confers an express, free standing affirmative right to a reasonable accommodation, whereas the PDA does not. It thus follows *a fortiori* from *Barnett* that the PDA does not entitle pregnant employees to get priority over more senior colleagues.

But if Petitioner's approach were adopted, it would overturn the seniority policies of thousands of American businesses and frustrate the valid goals of these policies. As this Court has recognized, "[t]he typical seniority system provides important employee benefits by creating, and fulfilling, employee expectations of fair, uniform treatment they consequently encourage employees to invest in the employing company, accepting less than their value to the firm early in their careers in return for greater benefits in later years." *Barnett*, 535 U.S. at 404. Petitioner's rule would undercut the uniformity and evenhandedness of such policies by requiring employers to prioritize pregnant employees ahead of everyone else when it comes to securing light-duty assignments, even at the expense of more senior employees who are equal in their ability to work. That would be significantly disruptive to the many American businesses—and millions of their employees—that reward seniority on a pregnancy-neutral basis.

Indeed, Petitioner's approach to the PDA—if accepted—would be more disruptive than the ADA claim pressed (unsuccessfully) in *Barnett*. Although the injured employee in *Barnett* sought to use the ADA's "reasonable accommodations" clause to gain priority over more senior colleagues, the ADA at least contains employer protections that allow the employer to deny such accommodations if doing so "would impose an undue hardship on [its] business." 42 U.S.C. § 12112(b)(5)(A). The PDA of course, does not contain a hardship exception to Petitioner's proposed accommodation claim.

Thus, Petitioner's view of the PDA would engraft an implied "reasonable accommodations" clause without the concomitant statutory defenses expressly made available for employers to defend against accommodation claims under other statutes, such as the ADA.

* * *

Each of the scenarios posited above flows directly from the logic of Petitioner's (and the Government's) interpretation. And each confirms the folly of attempting to rewrite Title VII law based on a passage of text in the definitional section of a statute while refusing to consider the broader statutory context.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

KATHLEEN M. SULLIVAN
QUINN EMANUEL
URQUHART & SULLIVAN
LLP
51 Madison Ave., 22nd Floor
New York, NY 10010

LILY FU CLAFFEE
KATE COMERFORD TODD
STEVEN P. LEHOTSKY
WARREN POSTMAN
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LORI ALVINO MCGILL
Counsel of Record
QUINN EMANUEL
URQUHART & SULLIVAN LLP
777 6th Street, NW
Washington, DC 20001
lorialvinomcgill@
quinnemanuel.com
(202) 538-8000

October 31, 2014

AMICUS CURIAE BRIEF

No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG,
Petitioner,

v.

UNITED PARCEL SERVICE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF U.S. WOMEN'S CHAMBER OF COMMERCE, GREATER NEW YORK CHAMBER OF COMMERCE, KINGSTON 11 CUISINE, LEARNING EXPRESS, INC., MAIN STREET ALLIANCE, THE SHUCHART GROUP, AND TIGRESS FINANCIAL PARTNERS AS *AMICI CURIAE* SUPPORTING PETITIONER

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

September 11, 2014

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INTEREST OF *AMICI CURIAE*[1]

The U.S. Women's Chamber of Commerce is a non-profit organization designed to advance the interests of women in the business community. The Women's Chamber supports strong education and employment opportunities with fair pay and advancement, and promotes work environments that are hospitable to women and families, in an effort to transform the economics of the labor market and to dismantle barriers that stifle sustainable economic growth. The Women's Chamber often files briefs to inform courts of legal and policy issues of concern to its membership, including in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

The Greater New York Chamber of Commerce is an organization that provides valuable services to more than 22,000 business and civic leaders who represent the backbone of the New York business community.

Kingston 11 Cuisine is a restaurant operating in Oakland, California, that has more than 30 employees.

Learning Express, Inc., headquartered in Devens, Massachusetts, is the nation's leading franchisor of educational toy stores. To date, there are more than

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief. Letters granting blanket consent to the filing of *amicus* briefs have been filed by the parties.

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INTRODUCTION AND SUMMARY

Working women play an increasingly important role in the Nation's economy. Over the past several decades, the percentage of women in the workforce has risen significantly to the point that nearly half of all workers are women. That substantial increase also includes women of child-bearing years.

To address and encourage working women as valuable members of the workforce, businesses have become increasingly flexible in their policies concerning employees' health needs, from ordinary wellness programs to workers with disabilities. The purpose of this *amicus* brief is to demonstrate that flexibility has become much more common in recent years, much more important in addressing specific needs of workers, much less expensive than might be perceived, and much more economically productive than anticipated. In short, accommodating workers who are pregnant leads to greater productivity at minimal cost.

Amici take no position on the specific legal question in dispute, but write to address a concern raised by the Fourth Circuit below. In rejecting petitioner's appeal, the Fourth Circuit indicated that petitioner's reading of the statute would result in "pregnancy [being] treated more favorably than any other basis," App. 21a, and thus would "transform an antidiscrimination statute into a requirement to provide accommodation to pregnant employees, perhaps even at the expense of other, nonpregnant employees," App. 22a.

As this brief will describe, for many employers today, providing reasonable accommodations for those pregnant workers who need them is completely consistent with their treatment of the workforce as a whole. Today, smart businesses recognize that their success depends on the wellness, retention, commitment, and morale of their workforce. Accordingly, employers today increasingly seek to empower their employees by providing them the flexibility and accommodations to allow them to balance work and family. Far from constituting preferential treatment, much less an undue burden, accommodating the needs of pregnant workers by allowing them access to existing programs is no more than a consistent application and outgrowth of this broader philosophy and approach, which evenhandedly addresses the needs of employees.

Moreover, the "consequences" of providing reasonable accommodations and workplace flexibility responsive to employees' needs are benefits both to workers and to the bottom line. When businesses invest in their employees in this manner, they reduce costly workforce churn, enhance workplace safety, and increase employee engagement and productivity.

Providing reasonable accommodations to pregnant workers who need them thus not only protects the health and economic security of workers, but also promotes the health and financial success of the organizations that employ them. Providing those accommodations also benefits the national economy, because ensuring that pregnant workers can continue to do their jobs both protects the buying power of these women and their families and harnesses the productivity of workers who otherwise would be forced out of work, and perhaps out of the labor market entirely, by pregnancy.

In short, from the perspective of the employers and business associations represented in this brief, consistency in extending to pregnant workers accommodations that some other temporarily disabled workers already receive is neither troubling nor burdensome. On the contrary, it is part and parcel of modern business practices that value employees, invest in the workforce, and realize the business gains that flexibility, wellness, and other comprehensive programs make possible.

STATEMENT OF THE CASE

Women in the workforce long have faced significant challenges after becoming pregnant. In colonial times, a woman who worked as an indentured servant could be forced to add on additional time "to make up for her reduced services during the pregnancy and recovery after birth, as well as while she cared for the infant."[2]

In the nineteenth century, women increasingly assumed roles in the industrial workplace, from textile mills to factories. In the period between 1880 and 1910, the number of women gainfully employed grew dramatically – particularly in the mercantile, clerical, and industrial sectors – from 13.5% of the total bread winners in the United States to 21.2%.[3] Yet, even as the number of working women rose, attitudes about pregnancy among workers were slow to change. "In the nineteenth and early twentieth centur[ies], 'doctors openly denounced the concept of two-career marriage,' of course meaning that a wife belonged in the home."[4] The predominant view, reflected in medical advice, corporate policy, and public policy, was that workers who became pregnant had to leave their jobs.[5] As a result, in 1900, although

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[2] Courtni E. Molnar, *"Has the Millenium Yet Dawned?": A History of Attitudes Toward Pregnant Workers in America*, 12 Mich. J. Gender & L. 163, 176 (2005).

[3] *See* Annie Marion MacLean, *Women Workers and Society* 21-22 (Chicago, A.C. McClurg & Co. 1916), *available at* http://pds.lib.harvard.edu/pds/view/2573741?n=39.

[4] Molnar, 12 Mich. J. Gender & L. at 168 (quoting Reva Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 310 (1992)).

[5] *See id.*

20% of all women worked for pay, less than 6% of married women older than 15 did so.[6]

That was not necessarily true for women of color. Due in part to the lack of job opportunities for black males after the Civil War, the percentage of black women who worked in the late nineteenth and early twentieth centuries – even after becoming pregnant – was significant.[7] Consequently, "black women were still far more likely to work than white women."[8] That also was true of poorer working class women.[9]

This Court's decision in *Muller v. Oregon*, 208 U.S. 412 (1908), was an early important case addressing views about women in the workplace. In that case, this Court upheld a maximum hour law for women workers. *Id.* at 421. Although this Court's decision upholding the legislation in *Muller* reflected a certain protective solicitude of working women, social legislation that followed had the effect of facilitating practices that forced women out of work when they became pregnant. Even as social legislation addressed the issue of maximum hours of work for women, for example, laws and corporate policies placed women who became pregnant in a particularly difficult bind. Many employers forced them out of jobs at a certain point in their pregnancy, and then state laws denied them unemployment compensation on the theory that their pregnancy or child-bearing made them ineligible to participate in the workforce. Midway

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[6] *See* Dora L. Costa, *From Mill Town to Board Room: The Rise of Women's Paid Labor*, 14 J. Econ. Persp. 101, 101 (Fall 2000).

[7] *See* Molnar, 12 Mich. J. Gender & L. at 169.

[8] *Id.* (internal quotation marks omitted).

[9] *See* Costa, 14 J. Econ. Persp. at 101.

through the twentieth century, some 35 States denied women unemployment insurance benefits. As Reva Siegel explained, "pregnancy was excluded from state unemployment insurance coverage, on the presumption that the pregnant woman was no longer an active candidate in the labor market – a statutory presumption that prevailed until prohibited by federal law."[10]

During World War II, the role of women in the industrial workforce increased dramatically. An estimated 8 million women entered the workforce during the war, approximately three-quarters of whom were married.[11] A national campaign to support women in the workforce – popularized in song, film, and posters with the fictional "Rosie the Riveter" – promoted women workers in shipyards, steel mills, foundries, and lumber mills as electricians, mechanics, and boilermakers, as well as operators of streetcars, buses, cranes, and tractors. The war effort increased opportunities for women in all types of roles, from engineers, physicists, and chemists to doctors and lawyers, and from farm workers and managers to journalists and police officers.[12] The need for women to replace men on factory lines, however, did not alter longstanding policies requiring

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[10] Reva Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 942 n.63 (1985).

[11] *See* Mary P. Ryan, *Womanhood in America* 316-17 (1975).

[12] *See* Penny Colman, *Rosie the Riveter: Women Working on the Home Front in World War II* 16-18 (1995).

that they be fired or forced to take an unpaid leave of absence when they became pregnant.[13]

By the 1950s and 1960s, "many employers had mandatory leave policies requiring women to leave work upon reaching a certain month of pregnancy, regardless of whether they were able and willing to continue working."[14] Even as late as 1960, "women were still commonly fired if they became pregnant."[15]

In 1974, this Court struck down mandatory maternity leaves imposed by public employers that operated regardless of the woman's desire or ability to perform her job functions. *See Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 632 (1974). Passage of the Pregnancy Discrimination Act ("PDA") in 1978 followed shortly thereafter and had a profound effect on the corporate world. Whereas in the late 1960s, "many corporations still required pregnant women to resign; by the late 1970s, few did so."[16]

During the last three decades, the number of women in the workforce has continued to increase. In 1980, women made up 43% of the U.S. workforce, up from 29% in 1950, with a total of approximately 45 million in the workforce (up from 18 million in

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[13] *See* Sheila B. Kamerman, Alfred J. Kahn & Paul Kingston, *Maternity Policies and Working Women* 35 (1983); Molnar, 12 Mich. J. Gender & L. at 175.

[14] Molnar, 12 Mich. J. Gender & L. at 170.

[15] *Id.* at 170-71 (citing Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325, 335 (1984-85)).

[16] Erin Kelly & Frank Dobbin, *Civil Rights Law at Work: Sex Discrimination and the Rise of Maternity Leave Policies*, 105 Am. J. Soc. 455, 456 (1999).

1950).[17] Currently, women make up nearly half (47%) of the U.S. labor force, up from 38% in 1970.[18] In 1980, approximately 52% of all women age 16 and over were working or looking for work, compared to 34% in 1950.[19] In the 1970s, the participation rate for women in their prime years for child-bearing and early childrearing increased from 43% in 1970 to 65% in 1980.[20] As those numbers have increased, so too have attitudes changed about working women and the policies businesses have adopted to address flexibility in the workplace.

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[17] *See* Linda J. Waite, *U.S. Women at Work* iv (The Rand Publication Series, Dec. 1981) ("Waite, *U.S. Women at Work*").

[18] *See* Pew Research Center, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family* 9 (2013) ("Pew, *Modern Parenthood*"), *available at* http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf.

[19] *See* Waite, *U.S. Women at Work* at 2.

[20] *See id.* at 2-3.

ARGUMENT

I. PROVIDING PREGNANT WORKERS WITH TEMPORARY ACCOMMODATIONS IS GOOD BUSINESS PRACTICE AND CONSISTENT WITH THE PROGRAMS THAT TODAY'S FIRMS OFFER THEIR EMPLOYEES

Many businesses already are accommodating pregnant workers and workers with other health-related needs. Practices, however, are not uniform and vary depending on the situation in each work setting. Data show that a substantial percentage of current employers offer flexible working arrangements. A wealth of data and studies shows that flexible accommodations can be beneficial to workers and businesses alike.

A. In Today's Workforce, Firms Have Adopted A Range Of Workplace Flexibility And Employee Health Programs Aimed At Creating Strong, Flexible Teams And Retaining Talent

For a variety of reasons pertaining to recruitment, retention, productivity, and cost, businesses increasingly more commonly understand the values of workplace flexibility and health and wellness programs for their employees. Retaining workers and motivating them to remain loyal and committed to their existing employer has substantial economic benefits. The types of programs now routinely offered by companies include:

- Employee assistance programs, such as smoking cessation and addiction programs.
- Wellness programs, including gym membership, food services, and recreational programs.

- Flexible work programs, including telecommuting, flexible shift programs, and longer hours/fewer days schedules.

More than three-quarters (77%) of employers provide Employee Assistance Programs ("EAPs") that help employees deal with personal problems that may negatively affect their work or personal lives. In addition, more than one in five (21%) provide work-life seminars or workshops at the workplace addressing issues of parenting, child development, elder care, and so forth.[21] Among large employers with more than 1,000 employees, 95% provide EAPs.[22]

Wellness programs also have become more common over the years, and "92 percent of employers with 200 or more employees reported offering them in 2009."[23] They can include fitness programs (e.g., Motorola Mobility[24]), healthy living and smoking cessation classes (e.g., Kaiser Permanente[25]), weight management (e.g., AT&T[26]), and on-site health and

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[21] *See* Kenneth Matos & Ellen Galinsky, *2014 National Study of Employers* 32 tbl. 13 (Families & Work Inst. 2014) ("Matos & Galinsky").

[22] *See id.*

[23] Soeren Mattke, Christopher Schnyer & Kristin R. Van Busum, *A Review of the U.S. Workplace Wellness Market* 5 (July 2012) ("*U.S. Workplace Wellness*"), *available at* http://www.dol.gov/ebsa/pdf/workplacewellnessmarketreview2012.pdf.

[24] *See* http://mot-mobilitylivesmart.com/benefitsatmoto/april14/index.html.

[25] *See* http://www.kaiserpermanentejobs.org/work-life-balance.aspx; http://www.kaiserpermanentejobs.org/benefits.aspx.

[26] *See* http://att.jobs/media/47959/benefits-overview_mgmt-l1-l4_final_121613.pdf.

wellness centers (e.g., Verizon[27]). Many companies also now offer a range of work-life benefits, such as on-site child care (e.g., Motorola Mobility[28]).

One study explains that many workplace flexibility programs popular among the largest employers

> allow at least some groups of workers to have control over when they take breaks (92%), take time off for important family and personal needs without loss of pay (82%) and periodically change their starting and quitting times within some range of hours (81%). They are next most likely to allow at least some groups of employees to return to work gradually after leaves for childbirth and adoption (74%) and work some of their regular paid hours at home occasionally (67%).[29]

As one report by the Society for Human Resource Management recently explained, "work-flex benefits represent a possible low-cost way to stand out from other potential employers."[30] That same report found, for example, that more than one-half of employers permit telecommuting on an ad hoc basis.[31] Those data and examples confirm the increasing numbers and types of flexible arrangements offered by employers.

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[27] *See* http://responsibility.verizon.com/engaging-employees/#benefits.

[28] *See* http://mot-mobilitylivesmart.com/USBenefitsBooks/Work_Life/MMI_2014_Benefits_Book_W2W_WorkLife.htm#TopOfPage.

[29] Matos & Galinsky at 18 (footnote omitted).

[30] Society for Human Resource Management, *2014 Employee Benefits: An Overview of Employee Benefits Offerings in the U.S.* 7 (June 2014), *available at* http://www.shrm.org/Research/SurveyFindings/Documents/14-0301%20Benefits_Report_TEXT_FNL.pdf.

[31] *Id.* at 35, tbl. G-1.

B. Significant Numbers Of Pregnant Workers Want To Stay On The Job Where Possible

A likely reason for greater flexibility in workplace arrangements is that employees value their jobs and their relationships with employers and want to find ways to accommodate working life with their personal situations. A large percentage of companies' talent consists of women, many of whom will be pregnant and return to work after giving birth. In modern workplaces, half of employees are women, and mothers make up a significant percentage of personnel in the workplace. In 2012, 47% of employees in the United States were women,[32] and 36% of full-time wage and salary workers were mothers of children under age 18.[33] In recent years, more than half of working mothers have returned to work within one year after having a baby.[34]

Yet just as women have a variety of motivations for continuing to work during and after their pregnancy – economic, satisfaction with their work, mental stimulation, and the like – so, too, do they face differing circumstances and needs during pregnancy. "[E]ven during a 'normal' pregnancy, many women will have different needs than before they became pregnant,"[35] and some pregnant workers need no

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[32] *See* Bureau of Labor Statistics, *Women in the Labor Force: A Databook* 2 (May 2014), *available at* http://www.bls.gov/cps/wlf-databook-2013.pdf.

[33] *See* Bureau of Labor Statistics, *Highlights of Women's Earnings in 2012*, at 5 (Oct. 2013), *available at* http://www.bls.gov/cps/cpswom2012.pdf.

[34] *See* Wen-Jui Han et al., *The Timing of Mothers' Employment After Childbirth*, Monthly Labor Rev. 15, 15 (June 2008), *available at* http://www.bls.gov/opub/mlr/2008/06/art2full.pdf.

[35] Molnar, 12 Mich. J. Gender & L. at 185.

special accommodations at all. Accommodating those varying circumstances, therefore, becomes important for the pregnant worker and the workplace alike. Like employees with temporary disabilities, pregnant workers sometimes may be advised by their doctors to refrain from heavy lifting, to sit more frequently, or to take more water breaks during the circumscribed period of pregnancy.

C. Common-Sense Measures To Retain Employees And Maximize Their Ability To Contribute Can Provide A Useful Framework For Understanding How Accommodations For Pregnancy Yield Gains For Employers

One of the important developments over the past quarter-century has been the increasing recognition that flexibility and accommodation to workers' needs actually makes good business sense. Accommodating employees with disabilities and employees who require schedule adjustments due to illness, family needs, and other factors can promote important business values. Changing attitudes about such practices has not always been easy, but data increasingly reveal the business justifications for workplace accommodations. By analogy, many of the accommodations already provided by many businesses are of types that would benefit pregnant workers and provide corresponding benefits to businesses.

1. Accommodations Decrease Employee Turnover

A Department of Labor Job Accommodation Network ("JAN") survey found that 90% of employers reported that providing an accommodation for disabilities allowed them to retain valued employees, and 61% said that it "[e]liminated costs associated

with training a new employee."[36] Surveys also reveal a high correlation between worker quit rates and workplace policies. Data from the Bureau of Labor Statistics show that the businesses with the highest quit rates are such services as hotels, motels, and food-services industries. In 2011, approximately 37% of employees in those sectors reported that they quit their jobs that year, nearly twice as many as left their jobs involuntarily. In addition to being businesses that tend to pay low wages, they also "often have little in the way of workplace benefits or policies to help workers address conflicts between work and family."[37]

An inability of a company to retain valuable employees imposes substantial costs on a business. Job turnover can be particularly expensive for employers, who need to re-hire and re-train a new employee. "Thirty case studies taken from the 11 most-relevant research papers on the costs of employee turnover demonstrate that it costs businesses about one-fifth of a worker's salary to replace that worker."[38] That is true even in replacing workers who earn less than $50,000 annually – which covers three-quarters of all workers in the United States – as 22 case

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[36] Beth Loy, Job Accommodation Network, *Workplace Accommodations: Low Cost, High Impact* 5 (Sept. 2013) ("JAN Survey"), *available at* http://www.askjan.org/media/downloads/LowCostHighImpact.pdf.

[37] Heather Boushey & Sarah Jane Glynn, Center for American Progress, *There Are Significant Business Costs to Replacing Employees* 3 (Nov. 16, 2012), *available at* http://cdn.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.

[38] *Id.* at 1.

studies "show a typical cost of turnover of 20 percent of salary."[39]

To replace workers (whether their termination is voluntary or involuntary), firms have to incur substantial costs, including for advertising for the positions, time spent interviewing candidates, and agency and search firm fees. For certain positions, such costs might include hiring a company recruiter and paying relocation assistance. Those costs represent tangible out-of-pocket expenditures for businesses. In addition, workers who separate from a firm take with them firm-specific knowledge (such as how to manage a computer program used only by that firm or corporate procedures and methods of doing business).[40] All told, therefore, the costs of replacing workers can be substantial.[41]

Providing accommodations that induce workers to stay in their positions can be a valuable means of reducing employee turnover. The JAN Survey found that 61% of employers reported providing accommodations for employees with disabilities eliminated costs associated with training a new employee.[42] In such fields as sales and customer service, workplace flexibility improves employee retention and reduces

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[39] *Id.* at 1-2.

[40] *See* Executive Office of the President, Council of Economic Advisers, *Work-Life Balance and the Economics of Workplace Flexibility* 17 (Mar. 2010) ("*Work-Life Balance*"), *available at* http://www.whitehouse.gov/files/documents/100331-cea-economics-workplace-flexibility.pdf.

[41] *Id.* *See also* PricewaterhouseCoopers, *2009/2010 US Human Capital Effectiveness Report – Executive Summary* 9 (Dec. 2009), *available at* http://www.pwc.com/en_US/us/hr-saratoga/assets/human-capital-effectiveness-report-0910.pdf.

[42] JAN Survey at 5.

recruitment and training costs of new employees.[43] Employees surveyed about flexible workplace arrangements generally reported that they were 30% "more likely than employees without flexibility to intend to stay with their employers for more than two years."[44]

Other studies explain that the reason for such retention is that flexible workplace arrangements deepen the level of commitment by employees to their workplace. Notably, this is not just a phenomenon for higher-wage workers. The studies reveal that, even among lower-wage workers, flexibility can make a profound effect on loyalty to an employer. "Job commitment was 63% higher among low-wage employees who felt their managers provided sufficient flexibility to meet their personal and family responsibilities than among employees who felt their managers did not offer sufficient flexibility."[45] And an in-depth study of five companies that had implemented flexibility for their hourly and nonexempt workers showed that "employee commitment is 55 percent higher for employees who have the flexibility they need, compared to those who do not."[46]

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[43] *See* Liz Watson & Jennifer E. Swanberg, Workplace Flexibility 2010, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation* 24 (May 2011) ("Watson & Swanberg"), *available at* http://workplaceflexibility2010.org/images/uploads/whatsnew/Flexible%20Workplace%20Solutions%20for%20Low-Wage%20Hourly%20Workers.pdf.

[44] *Id.*

[45] *Id.*

[46] Amy Richman et al., Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for Expansion* 14 (Feb. 2011) ("*Business Impacts of Flexibility*"), *available at* http://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf.

Concrete examples of these effects include:

- "A study of more than 1,500 U.S. workers reported that nearly a third considered work-life balance and flexibility to be the most important factor in considering job offers. In another survey of two hundred human resource managers, two-thirds cited family-supportive policies and flexible hours as the single most important factor in attracting and retaining employees."[47]
- "[S]tudies of the effect of policies that allow new parents to take paid time away from work on the employment and wages of workers find that such arrangements encourage new parents to stay in the labor force."[48]
- "In a survey of 120 randomly-selected employers in New York, economists found that those that offered flexible sick leave and child care assistance had significantly lower rates of turnover. Other studies report that firms with more flexible telecommuting practices had lower turnover."[49]

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[47] *Work-Life Balance* at 16 (footnote omitted); *see also* Press Release, Hudson Highland Group, Inc., *In the Game of Hiring, Flexible Employers Win* (Feb. 12, 2008), *available at* http://us.hudson.com/Portals/US/documents/us-hudson-index-release-021208.pdf; Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford Univ. Press 2000).

[48] *Work-Life Balance* at 17-18.

[49] *Id.* at 18 (footnote omitted). *See* Christopher J. Ruhm, *The Economic Consequences of Parental Leave Mandates: Lessons from Europe*, 113 Q.J. Econ. 285-317 (1998); Philippa Yasbek, *The Business Case for Firm-Level Work-Life Balance Policies: A Review of the Literature* (Wellington, UK: Dep't of Labour Jan. 2004); Computer Economics, *Telecommuting Policies Can Lower IT Employee Turnover* (Sept. 2008), *available at* http://www.computereconomics.com/article.cfm?id=1395.

- "Based on responses from almost 42,000 IBM employees in 79 countries, the survey found that work-life balance – of which flexibility is a significant component – is the second leading reason for potentially leaving IBM, behind compensation and benefits."[50]
- "Deloitte has quantified flexibility's cost savings by calculating the turnover expense for those professionals who said they would have left the firm had they not had a flexible arrangement. Based on this calculation, the firm determined that it saved an estimated $41.5 million in turnover-related costs in 2003 alone."[51]

Although businesses can be expected to engage in rational choices that promote profitability, the empirical evidence seems to indicate that taking a longer-term view of profitability and costs can more than make up for any short-term costs incurred by providing a more flexible approach to workplace accommodations. When firms choose not to offer workplace flexibility arrangements, nearly one-third cite costs or limited funds. Yet "the benefits of adopting such management practices can outweigh the costs by reducing absenteeism, lowering turnover, improving the health of workers, and increasing productivity."[52] Because providing pregnancy accommodations would keep pregnant women on the job and thereby reduce turnover, reading the statute to require that pregnant workers be given access to the same accommodation programs already offered to other workers with temporary disabilities and on-the-job injuries will not be unduly costly or burdensome; on the

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[50] *Business Impacts of Flexibility* at 9.

[51] *Id.* at 10.

[52] *Work-Life Balance* at Executive Summary.

contrary, as explained above, it will cut down on turnover and save re-training and replacement costs.

2. Flexible Work Arrangements Improve Worker Attendance, Morale, and Productivity

Data from situations involving flexible accommodations for workers with disabilities and workers who are caregivers confirm the success of such programs in reducing employee turnover and its associated costs. Substantial evidence also shows additional benefits to flexible arrangements with effects on productivity. Providing accommodations to pregnant workers can be expected to improve employees' attendance, because workers would be able to utilize an accommodation rather than skip work altogether. Accommodations also enhance workers' morale and engagement, and therefore their productivity. Similar results have been seen in workplaces that provide disability accommodations and flexible work arrangements.

Providing flexible work arrangements and time off for personal and family needs can reduce the need for unscheduled absences. Studies show that employees able to use flexible work arrangements report less work-life stress and, consequently, fewer unscheduled absences and increased productivity.[53] Fewer unscheduled absences also means less overtime paid to other workers, thereby improving firm profitability.[54]

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[53] *See* Anna Danziger & Shelley Waters Boots, Urban Inst., *The Business Case for Flexible Work Arrangements* 1 (2008) ("Danziger & Boots"), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1001&context=legal.

[54] *See* Watson & Swanberg at 24.

In the disability context, survey data reveal that workplace accommodations increase productivity by increasing overall morale. The JAN Survey found that 60% of employers reported that providing accommodations to workers with disabilities increased overall company morale, 71% of employers stated that it increased the employee's productivity, and 56% responded that providing accommodations increased overall company productivity.[55] That increased morale also translated into better attendance. The JAN Survey found that 54% of employers reported better attendance from an employee after providing an accommodation for a disability.[56]

Data also support the common-sense notion that increased attendance and improved morale also will enhance productivity and performance. A 2010 report on work-life balance and workplace flexibility policies by the President's Council of Economic Advisers noted that "[w]orkers with more flexible arrangements report higher levels of job satisfaction, more loyalty and commitment to their employers, and 'high likelihood[s]' of remaining with their employers for the following year."[57] In a study of more than 700 firms in the United States, the United Kingdom, France, and Germany, researchers found a "significant positive relationship between work-life balance practices and total factor productivity."[58] Another study found that "[e]mployees with access to

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[55] *See* JAN Survey at 5.

[56] *See id.*

[57] *Work-Life Balance* at 17 (second alteration in original). *See* Paul L. Gerhardt, Jr., *Employee Retention Through Job Satisfaction* (Tacoma, WA 2001).

[58] *Work-Life Balance* at 20.

[flexible work arrangements] tend to be more satisfied, committed, and engaged with their jobs," which in turn "leads to increased innovation, quality, productivity, and market share."[59]

The Corporate Leadership Council conducted research in which it found that each incremental improvement in a worker's commitment by 10% can increase an employee's level of discretionary effort by 6% and performance by 2%.[60] A 2013 survey concluded that a high percentage of managers reported that flexibility programs improved employee engagement and motivation (64% and 65%, respectively). By contrast, only 6% of managers thought such programs negatively affected engagement and motivation.[61]

Such increased productivity facilitates a company's ability to grow. Hewitt Associates' research found that double-digit growth companies "have 39% more employees who are highly engaged" and "45% fewer highly disengaged employees" than single-digit growth companies.[62]

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[59] Danziger & Boots at 1. *See* Nick Bloom, Toby Kretschmer & John Van Reenen, *Work-Life Balance, Management Practices and Productivity* (Centre for Economic Performance, London School of Economics Jan. 2006), *available at* http://eprints.lse.ac.uk/4668/1/Work-Life_Balance%2C_Management_Practices_and_Productivity.pdf.

[60] *See Business Impacts of Flexibility* at 12.

[61] *See* WorldatWork, *Survey on Workplace Flexibility 2013*, at 30 (Oct. 2013), *available at* http://www.worldatwork.org/adimLink?id=73898.

[62] Hewitt Assocs. LLC, *Research Brief: Employee Engagement Higher at Double-Digit Growth Companies* 5 (2004), *available at* http://www.mckpeople.com.au/SiteMedia/w3svc161/Uploads/Documents/016fc140-895a-41bf-90df-9ddb28f4bdab.pdf.

3. Flexible Arrangements Improve Safety and Reduce Workers' Compensation Claims

Data from the disability context suggest strongly that providing pregnancy accommodations can reduce workplace injuries and associated costs, such as workers' compensation payments and, possibly, litigation costs. It also can reduce rates of employee stress, which in turn would improve productivity. Accommodations can better enable workers to avoid making the choice between doing tasks related to their job and following doctor's advice about actions that can increase the likelihood of injury.

Costs associated with pregnancy complications, injury, and stress are significant. "Employers spend more than $12 billion annually on claims related to prematurity and complicated births in the United States."[63] Nor can employers avoid such costs by moving pregnant workers onto unpaid leave because other research shows that "stress from job loss can increase the risk of having a premature baby."[64] Studies show generally that, when employers reduce stress, the number of workers' compensation claims goes down. A plastics manufacturer in Minnesota, for example, decreased workers' compensation claims

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[63] March of Dimes, *Protect New York's Moms From Pregnancy Discrimination* (2014), *available at* http://www.marchofdimes.com/pdf/newyork/Pregnancy_Discrimination_Fact_Sheet.pdf.

[64] A Better Balance, *Fact Sheet: Reasonable Accommodations for Pregnancy in New York* 1 (Mar. 2012), *available at* http://www.abetterbalance.org/web/images/stories/Documents/fairness/factsheets/NY_RA_Fact_Sheet_3-19-12.pdf; *see also* David Lee, *Managing Employee Stress and Safety: A Guide to Minimizing Stress-Related Cost While Maximizing Employee Productivity* 1 (2000), *available at* http://www.memic.com/Portals/0/docs/Safety/ManagingStress.pdf.

by 56% after introducing new initiatives to manage employee stress.[65] The JAN Survey found that 44% of employers reported that providing accommodations to employees with disabilities increased workplace safety and 39% reported reduced workers' compensation and other insurance costs.[66] Providing appropriate accommodations to pregnant workers to facilitate a safer workplace during pregnancy "will undoubtedly reduce stress on these workers, and these studies suggest reduced stress will lower their risk of injury."[67]

Although the data are not directly comparable, the experience of wellness programs is instructive. Such programs, which seek to improve employee health and well-being, can significantly decrease overall business costs. Among larger firms (defined as greater than 200 workers), 81% "affirmed that workplace wellness improved health" and 69% "said that it reduced cost."[68] Wellness programs have significant effects on workplace productivity. The RAND Corporation's study of workplace wellness programs found a return on investment of $15.60 per dollar spent, $1,350 saved per employee in short-term disability costs, and $180 per participant per year saved (taking into account health care costs).[69]

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[65] *See* National Women's Law Center, *Fact Sheet: The Business Case for Accommodating Pregnant Workers* 3 (Dec. 2012) ("NWLC, *Business Case*"), *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf.

[66] JAN Survey at 5.

[67] NWLC, *Business Case* at 3.

[68] *U.S. Workplace Wellness* at 22.

[69] *Id.* at 25.

Similar savings seem likely for pregnancy-related accommodations.

D. The Kinds Of Accommodations Pregnant Workers Need Are Not Costly And Should Be Relatively Straightforward To Provide

1. Most Accommodations Sought by Pregnant Workers Are Low-Cost or No-Cost

Pregnancy produces physiological changes in a woman's body. One of the hormones produced during pregnancy, relaxin, "causes ligaments to soften and stretch."[70] The body produces that hormone to loosen the pelvic structure to accommodate growth in the fetus and delivery of the baby. A byproduct of relaxin, however, is in the relaxation effect it causes to other ligaments, including in the neck, shoulder, elbow, knees, and back. With less support from ligaments, the muscles must do more of the work of supporting key joints, which in turn produces muscle fatigue and reduces strength.[71]

The effect of those physiological changes alters some pregnant workers' ability to lift, to engage in repetitive motions, and to climb stairs or ladders. While many pregnant workers are able to continue working with no modification throughout pregnancy, others, particularly those whose jobs involve heavy physical activity, require some temporary modifications. For example, some pregnant workers may need to sit more frequently, to drink water more frequently, and to rotate into non-heavy-lifting assignments at some point in their pregnancies.

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[70] Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 Stetson L. Rev. 1, 3 (1995).

[71] *See id.* at 3-4.

Most pregnancy-related accommodations are short-lived, by nature, and thus are not costly due to longevity (i.e., they will not go on indefinitely). In considering a state pregnancy accommodations law, for example, the California Fair Employment and Housing Commission ("FEHC") estimated the "[c]ost of average pregnancy reasonable accommodation" as $500.[72] A high percentage of accommodations (58%) "cost absolutely nothing to make."[73] Another 36% of the businesses surveyed by JAN reported only a one-time cost.[74] Only approximately 4% reported an ongoing, annual cost to the company.[75] "In general, pregnancy accommodation can be expected to be less costly than average disability accommodations because no special equipment is usually needed to accommodate a pregnant woman and the accommodation is needed for a short, finite period of time."[76]

Those results comport with the experience of providing accommodations for workers with disabilities, many of which entail greater longevity than the term of a pregnancy.

> Of the employers who gave cost information related to accommodations they had provided, 355 out of 610 (58%) said the accommodations needed by employees cost absolutely nothing.

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[72] FEHC, Notice of Proposed Rulemaking, *Sex Discrimination: Pregnancy, Childbirth or Related Medical Conditions*, California Regulatory Notice Register 563, 566 (Apr. 16, 2010) ("FEHC Notice"), *available at* http://www.oal.ca.gov/res/docs/pdf/notice/16z-2010.pdf. *See also* JAN Survey at 4.

[73] JAN Survey at 3.

[74] *Id.* at 4.

[75] *Id.*

[76] FEHC Notice at 567.

> Another 222 (36%) experienced a one-time cost. Only 24 (4%) said the accommodation resulted in an ongoing, annual cost to the company and 9 (1%) said the accommodation required a combination of one-time and annual costs; however, too few of these employers provided cost data to report with accuracy. Of those accommodations that did have a cost, the typical one-time expenditure by employers was $500.[77]

Employers surveyed that had implemented such accommodations also reported that they were effective. On a scale of 1 to 5, with 5 being extremely effective, 76% of respondents reported the accommodations were either "very effective or extremely effective."[78]

2. *Accommodating Pregnant Workers Generally Imposes Workplace Changes That Are Limited in Scope and Duration*

On a national level, the scope of accommodations needed for pregnant workers is relatively modest. In any given State, the share of workers who gave birth in a particular year typically is between 1.2% and 2%.[79] In the years 2009-2011, women workers who gave birth represented an average of just 1.6% of

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[77] JAN Survey at 4.

[78] *Id.*

[79] *See* National Women's Law Center, *Fact Sheet: Pregnant Workers Make Up a Small Share of the Workforce and Can Be Readily Accommodated: A State-By-State Analysis* 1 (Mar. 2013) ("NWLC, *State-By-State Analysis*"), *available at* http://www.nwlc.org/sites/default/files/pdfs/state_by_state_analysis.pdf (citing data from, *inter alia*, Integrated Public Use Microdata Series – American Community Survey, Minnesota Population Center, University of Minnesota, *available at* http://usa.ipums.org/usa/sda/ ("IPUMS")).

all employed people each year.[80] "Even when only employed women of childbearing age are considered, an average of just 4.7 percent had given birth in a particular year."[81] In light of the relatively short duration in which a woman is within her childbearing years, the overall effect on the workplace (compared to longevity for a working career overall) is relatively small.

E. Today's Workplaces Are Adept At Providing Accommodations

Many of the accommodations that can be important for a pregnant worker already are provided to workers with other conditions under the Americans with Disabilities Act of 1990 ("ADA"), provided those accommodations do not cause undue hardship. *See* 42 U.S.C. § 12101. These include:

- **Schedule modification**, which enables a worker to take more frequent breaks because of nausea, as upheld in the ADA context for HIV-positive employees who must take nausea-inducing medications.[82]
- **Modified workplace policies**, such as no food or drink, which can be important for pregnant workers who experience painful and potentially dangerous uterine contractions when not drinking water regularly, and also can be important for employees with diabetes.[83]

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[80] *See* NWLC, *State-By-State Analysis* at 1 (citing data from, *inter alia*, IPUMS).

[81] NWLC, *State-By-State Analysis* at 1.

[82] *See* Equal Employment Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act*, 2002 WL 31994335, at *4 (Oct. 17, 2002) ("EEOC Guidance").

[83] *See id.* at *19-20.

- **Temporary reassignment to a vacant position**, when available, to avoid heavy lifting, which can be necessary for pregnant workers.[84]
- **Providing or modifying equipment**, which can be a reasonable accommodation to a person with a disability, and also important to a pregnant worker.[85]
- **Restructuring assignments or reassigning tasks to other employees**, so that, for example, a pregnant worker need not be required to stand for long periods, just as an employee with lupus would not need to do so.[86]
- **Light duty**, which many employers already provide both to workers who are injured on the job as well as to workers with temporary disabilities.[87]

Reading the PDA to require employers to provide the same accommodations to pregnant workers that it does to others with temporary disabilities will not require the creation of new or burdensome programs. Rather, pregnant workers should be able to access existing "light duty" programs and other accommoda-

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[84] *See id.* at *20; 29 C.F.R. § 1630.2(o)(2)(ii).

[85] *See* 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii).

[86] *See* EEOC Guidance, 2002 WL 31994335, at *3.

[87] *See* EEOC, *Technical Assistance Manual: Title I of the ADA* § 9.4 (Jan. 1992), *available at* http://askjan.org/links/ADAtam1.html#IX; *EEOC Enforcement Guidance: Workers' Compensation and the ADA* Q.28 (Sept. 1996), *available at* http://www.eeoc.gov/policy/docs/workcomp.html; *see generally Office of the Architect of the Capitol v. Office of Compliance*, 361 F.3d 633, 641 (Fed. Cir. 2004) ("[T]he fact that a possible accommodation may conflict with an employer's workplace rules and policies does not necessarily mean that such an accommodation is not reasonable.").

tions that employers provide to workers with other needs and disabilities.

Like UPS, many firms have existing "light duty" and other programs designed to ensure that employees who are temporarily unable to perform certain job functions can nonetheless continue to provide value to the company, and earn a paycheck, by being reassigned on a time-limited basis to light duty and other alternative rotations. *See* App. 6a-7a. Frequently these programs are made available to workers injured on the job. One likely effective and low-cost approach is to include in these existing programs pregnant workers who are, for example, temporarily restricted from lifting or traveling towards the ends of their pregnancies. Companies routinely make that type of straightforward business adjustment. Including pregnant workers in these existing programs does not add significant cost.

II. PROVIDING ACCOMMODATIONS FOR PREGRANT WORKERS IS IMPORTANT TO THE NATIONAL ECONOMY

For decades, working women have fueled economic growth in the United States. "In 1968, 48 percent of children were raised in households where the father worked full-time, the mother was not in the labor force, and the parents were married; by 2008, only 20 percent of children lived in such households."[88] Currently, women make up nearly half (47%) of the U.S. labor force, up from 38% in 1970.[89] The economic effect of that work also has been significant. If no additional women had joined the paid economy since 1970, U.S. Gross Domestic Product ("GDP") would be

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[88] *Work-Life Balance* at 2.

[89] *See* Pew, *Modern Parenthood* at 9.

approximately 75% of its current size.[90] As Federal Reserve Chair Janet Yellen has noted: "[I]t is no coincidence that America's great success in the past century came as women steadily increased participation in every aspect of society. [O]ur economic success has been due in substantial part to the fuller participation and contribution of women to the economy."[91]

Between 2006 and 2008, two-thirds of women were working when they had their first child, and 88% of those worked into their last trimester.[92] "Almost two-thirds of American women (62 percent) with a birth in the last year were in the labor force in 2008."[93] Statistics confirm that the stay-at-home-mom phenomenon of the post-World War II era has greatly diminished. A majority (59%) of working-age parents with young children who are either married or living with a partner are dual-income couples, and approximately 6% of couples now have mothers who are the sole provider for the family.[94] All told, working mothers who are the sole or primary earner

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[90] *See* Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy* 4 (Wall Street Journal Executive Task Force for Women in The Economy 2011), *available at* http://online.wsj.com/public/resources/documents/WSJExecutiveSummary.pdf.

[91] Chair Janet L. Yellen, Remarks on Women's History Month, At the Women's History Month Reception, U.S. Capitol, Washington, D.C., March 25, 2014, *available at* http://www.federalreserve.gov/newsevents/speech/yellen20140325a.htm.

[92] *See* U.S. Census Bureau, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008*, at 4, 6 (Oct. 2011), *available at* http://www.census.gov/prod/2011pubs/p70-128.pdf.

[93] *Id.* at 1.

[94] *See* Pew, *Modern Parenthood* at 44.

compose 40% of all American households with children under the age of 18.[95]

Although the importance of women in the workforce can be measured in numerous ways, in the sole metric of the macroeconomic impact of women as consumers, the effects are significant. Women are, by a large measure, much more significant consumers than men, and pregnant women and mothers are especially valuable consumers to the national economy. Women control 73% of household spending, which translates into more than $4 trillion in annual discretionary spending – a very powerful role in an economy driven by consumption.[96] "Fleishman-Hillard Inc. estimates that women will control two-thirds of the consumer wealth in the U.S. over the next decade and be the beneficiaries of the largest transference of wealth in our country's history."[97] Success in integrating even more women into the

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[95] *See* Wendy Wang et al., Pew Research Social & Demographic Trends, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend* (May 29, 2013), *available at* http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/; Sarah Jane Glynn, Center for American Progress, *The New Breadwinners: 2010 Update – Rates of Women Supporting Their Families Economically Increased Since 2007*, at 2 (Apr. 2012), *available at* http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf.

[96] *See Invest in Women, Invest in America: A Comprehensive Review of Women In the U.S. Economy*, A Report by the Majority Staff of the Joint Economic Committee 7 (Dec. 2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=9118a9ef-0771-4777-9c1f-8232fe70a45c.

[97] Nielsen, *U.S. Women Control the Purse Strings* (Apr. 2, 2013), *available at* http://www.nielsen.com/us/en/insights/news/2013/u-s--women-control-the-purse-strings.html.

workforce will have additional substantial effects on the Nation's economy.

As the country's aging population retires or otherwise transitions out of the workplace, concerns arise about the slowing of workplace participation and consumer spending – leading to slower GDP, deeper recessions, and slower recovery periods. Economists have noted that higher female labor force participation can boost growth by mitigating the impact of a shrinking workforce.

> The challenges of growth, job creation, and inclusion are closely intertwined. While growth and stability are necessary to give women the opportunities they need, women's participation in the labor market is also a part of the growth and stability equation. In particular, in rapidly aging economies, higher female labor force participation can boost growth by mitigating the impact of a shrinking workforce.[98]

In some States, that effect already is occurring. According to a White House report, "if the United States raised female labor participation rates to the average participation rate of the top 10 states, our economy would add 5.1 million women workers, the equivalent of a 3-4% increase in GDP."[99]

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[98] Katrin Elborgh-Woytek et al., IMF Staff Discussion Note, *Women, Work, and the Economy: Macroeconomic Gains from Gender Equity* 4 (Sept. 2013), *available at* https://www.imf.org/external/pubs/ft/sdn/2013/sdn1310.pdf.

[99] The White House Council on Women and Girls, *Keeping America's Women Moving Forward: The Key to an Economy Built to Last* i (Apr. 2012), *available at* http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.

The continued macroeconomic effects of accommodating pregnant workers in their jobs therefore can be significant. Ensuring that women are able to continue working and earning income throughout pregnancy allows them to be more effective workers, more affluent consumers, and even more important contributors to economic growth while avoiding the devastating personal effects of cutting off women from their earning potential at the precise moment of greatest economic need.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

DAVID C. FREDERICK
Counsel of Record
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

September 11, 2014